Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STEFANO PICCIOTTO AND OTHERS
Petitioners,

v.

MASSACHUSETTS
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Stefano Picciotto
Judith Picciotto
Melita Picciotto
Athena Picciotto
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Salem, MA 01970
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QUESTIONS PRESENTED

The Petitioners seek review of any one, or a combination of, the following questions:

1. Does it violate due process when a trial devolves into what the press refers to as "a circus-like atmosphere" in which the trial judge allows jurors to come to court dressed in Halloween costumes, allows the attorneys for the opposition to pass candy and joke memorabilia to the jurors, and then allows them to provide jurors with a cast list of which popular Hollywood actors should play them in a possible movie of such an amusing trial?

2. Does it violate due process when the sitting judge has an improper *ex parte* meeting with a party to the litigation during the pendency of the action, is offered something of value at that meeting, and, when confronted by the other parties, denies that the meeting occurred, until said judge is actually presented with the sworn deposition testimony of the party to the litigation who admitted to their *ex parte* meeting?

3. Is it permissible for a state appellate court to change an uncontested factual state court record as a mechanism to uphold an otherwise tainted judgment, and then deny the defendants any appellate remedy?

4. Does it violate due process when a defendant is deprived of the right to represent his or herself in defense of property when the court has irrefutable knowledge and warning that it is appointing ineffective counsel?

5. Does it violate due process when defendants are barred from cross-examining their own trial attorney when the court orders their own trial attorney to be put on the witness stand to testify against them?

6. Does it violate due process for the trial court to divest itself, *sua sponte*, of *in rem* interpleader jurisdiction of court-deposited settlement funds, without providing the parties with notice or opportunity to be heard, in order to award 12% pre and post-judgment interest to the attorney lienholders parties, rather than awarding the interest that is actually generated by the court-held fund itself?

7. As a matter of law, may the trial court divest itself of *in rem* interpleader jurisdiction of court-deposited funds, without divesting itself of, or distributing the *rem* (court-deposited fund)?

8. When the post-judgment interest awarded by the court doubles or trebles the jury award by millions of dollars, is it grossly disproportional to the gravity of the *alleged* triggering offense, and thus unconstitutional pursuant to the Eighth Amendment of the Constitution of the United States of America?

9. Does a state court judgment that is in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution ever acquire validity, either through the state creating a false factual record, or through the doctrine of latches?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are as follows:

Petitioners/Plaintiffs:

Melita Picciotto, Pro se
Judith Picciotto, Pro se
Stefano Picciotto, Pro se
Athena Picciotto, Pro se

Respondents/Defendants:

The Hon. Mark V. Green
The Hon. R. Malcolm Graham
The Hon. Andrew R. Grainger

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts, which is at issue, is reported at 73 Mass. App. 141; 896 N.E.2d 937 (2008). [App. 4a] FAR was denied by 453 Mass. 103, 901 N.E.2d 138 (2009) and 453 Mass 1105, 902 NE2d 947 (2009), and the Massachusetts Supreme Judicial Court ("SJC") denied final appeal by Picciotto v. Appeals Court, 457 Mass. 1002; 927 N.E.2d 998 on June 9, 2010. [App. 1a]

JURISDICTION

The Massachusetts SJC denied review of this case on June 9, 2010. [App. 1a] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are:

1. The Due Process Clause of the Fifth Amendment of the U.S. Constitution, which applies to the states under the incorporation doctrine; [App. 103a]

2. The Petition Clause of the First Amendment to the U.S. Constitution; [App. 102a]

3. The Excessive Fine Clause of the Eighth Amendment to the U.S. Constitution; [App. 104a]

104. The Equal Protection Clause of the Fourteenth Amendment ; [App. 104a] and

5. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. [App. 104a]

STATEMENT OF THE CASE

Nature Of The Case And Prior Proceedings

On November 18, 2008, a panel of the Massachusetts Appeals Court, *i.e.*, "the Respondents", created a false record in its decision in the case of Zabin v. Picciotto, 73 Mass. App. Ct. 141 (2008). [App. 4a] The new record was rife with errors, misunderstandings, and alterations that were in direct contradiction to the uncontested factual record that was in front of the Respondents. However, the Respondents rendered a ruling based upon the new facts that they created. [App. 54a and 75a]

The Petitioners filed a motion with the Respondents to cause the Respondents to correct the most critical of the changes that they had made to the uncontested factual record. [App. 96a] The Petitioners further filed Petitions for Rehearing. [App. 54a and 75a]

The motion to correct the record and the Petitions for Rehearing, together with the uncontested supporting affidavit, put the Respondents on notice of precisely which critical

elements of the *uncontested* factual record had been changed. The Respondents refused to correct their alterations to the record, and denied any rights to relief. [App. 98a]

The Petitioners filed a notice of appeal. **The Respondents ruled that "no appeal lies from this action of the panel** "(Green, Graham, Grainger JJ)." [App. 98a] [Emphasis added], and they would not allow an appeal to go forward.

Therefore, on March 13, 2009, the Petitioners filed a Petition for Writ for Certiorari with the single justice of the Massachusetts SJC in order to cause the Respondents to correct the critical errors and/or changes in regard to the factual record.

On June 3, 2009, the Respondents answered the Writ. The Respondents conceded that their ruling was based on a false factual record; however, they made no attempt to correct the record. On June 22, 2009, the Petitioners moved for summary judgment. [App.100a]

The single justice dismissed the Writ of Certiorari against the Respondents by ruling that the Respondents' errors and changes in regard to the uncontested factual record was:

> . . . reviewable in the normal appellate process, *i.e.,* by petition for rehearing filed with the Appeals Court, or by application for further appellate review filed with the Supreme Judicial Court. [App. 100a]

Said applications are discretionary. Since the Petitioners had (as the state court acknowledged), submitted said applications, but had not been granted review[1] [App. 1a and 98a], the Petitioners appealed the Appellate Court's ruling that "no appeal" lies from the panel's revisions of the factual uncontested record [App. 98a] to the Massachusetts SJC. However, the Massachusetts SJC refused to grant relief and upheld the single justice. [App. 1a]

Statement Of Material Facts

1. This case arises from a global settlement of toxic tort actions and the discovery of a bankruptcy fraud, for which the Petitioners and others settled on January 6, 1999, for $9 million.

2. During the bankruptcy proceedings, the Petitioners had been represented by a series of attorneys (including Robert V. Costello) ("the attorney-lienholders"), who had withdrawn instead of allowing the Picciottos and their accountant to personally examine the books and records of the debtor, as is allowed them by law. Thus, the relationship with the attorney-lienholders had broken down long before the settlement occurred.[2]

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[1] The denials were not based on the merits, but were arbitrarily denied without a substantive review.

[2] The attorney-lienholders claimed that there was no bankruptcy fraud and that there was no insurance coverage, and that pursuing the books and records of the debtor would be a waste of their time and the Picciottos' money. The evidence of the subsequent discovery of the bankruptcy fraud and the value

3. The settlement occurred through a successor counsel by the name of Dana E. Casher, who secured access for the Picciottos to the debtor's records.

4. As attested to by the attorney who represented Travelers at the time of the settlement, the Petitioners sought to put aside one-third of the entire settlement to satisfy the claims of the attorney-lienholders.

5. That proposal did not satisfy the attorney-lienholders. Instead, they banded together and demanded the entire nine million-dollar settlement amount based on their respective (and successive) contingent fee agreements.

6. The attorney-lienholders' excessive fee demands led Travelers to file an interpleader action in the Suffolk Superior Court and deposit virtually all the settlement funds into the court register, pursuant to Mass. R. Civ. P. 22.

The Interpleader Action

7. The Massachusetts Superior Court has a rotation system of the judges sitting in the sessions in order to ensure fairness to the litigants.

8. In May of 1999, Judge Mitchel J. Sikora sat in the Suffolk County session in which the interpleader action was filed.

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of the pro se work of Melita Picciotto and United Policy Holders of America was barred from the jury by the trial judge.

9. While Judge Sikora was sitting on the case, one of the parties to the interpleader litigation, Robert V. Costello, had an improper *ex parte* meeting with the judge. He later admitted in a deposition that he had offered Judge Sikora something of value at such *ex parte* meeting.

10. After said *ex parte* meeting, Judge Sikora, instead of allowing the case to flow through the normal channels, assumed his own *de facto* assignment of the case, and held hearings in another county (Norfolk County), where he was then generally assigned.

11. Upon discovery of the improper *ex parte* meeting, the Petitioners questioned Judge Sikora.

12. Judge Sikora denied that the meeting had occurred.

13. Judge Sikora only admitted to the improper *ex parte* meeting when he was confronted with the deposition testimony of attorney-lienholder Costello.

14. The Petitioners filed a motion to recuse.

15. Judge Sikora denied said motion.

16. As has been averred by the Petitioners' interpleader action trial attorney, under the pains and penalties of perjury, during the interpleader proceedings Judge Sikora refused to allow a stenographic record, made false findings, and then refused to grant evidentiary hearings on his false findings.

17. Judge Sikora further deprived Petitioner Melita Picciotto of the right to represent herself, removed the Petitioner from the courtroom, denied a request to have a camera in the courtroom to document the Petitioner's courtroom behavior, denied an evidentiary hearing on his wrongful findings of fact, imposed an unwanted counsel[3] on the Petitioner, and then ordered that same counsel to testify against the Petitioners at the trial, without allowing cross-examination of said counsel.

18. Judge Sikora imposed upon the parties a conversion of the interpleader action into an action whereby parties were designated as plaintiffs and defendants to file claims against each other rather than claims against the settlement proceeds that had been deposited with the court.[4] Instead of having everyone be a claimant to such proceeds, he designated the attorney-lienholders as plaintiffs to pursue claims against their former clients; and he designated the former clients as the defendants.

19. The Petitioners had no notice or knowledge of said conversion, and believed that they were in an interpleader action in which each of their entitlements to portions of the settlement proceeds would be determined by the jury.

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[3] Notably, the court-imposed counsel informed the trial judge that she objected to being appointed counsel as well.

[4] This is reported in the decision in the case of Zabin v. Picciotto, 73 Mass. App. Ct. 141 (2008). [App. 4a]

20. At trial, Judge Sikora allowed the attorney-lienholders to seek fees in *quantum meruit* against their respective former clients with respect to the entire $9 million settlement amount, without first requiring that a determination be made of what portion each of the respective former clients was entitled to obtain from such settlement amount.

21. This element was critical to the action, because not all of the attorney-lienholders had represented all of the clients, and several separate and unrelated claims had been globally settled.

22. At trial, Judge Sikora allowed the jurors to come to court dressed in Halloween costumes; and he allowed the counsel for attorney-lienholder Costello to pass candies, joke memorabilia, and a cast list of who would play whom in the movie that would be made with respect to the case. The press described this as a "circus-like" atmosphere in the courtroom.

23. The Petitioners never agreed to such a spectacle, and they were appalled.

24. After trial, the court reported several of the critical trial tapes that contained appealable issues and documentary evidence "lost"[5], even though they were at all times in the care and control of the court.

25. Contrary to the Respondents ruling, the pre-trial Motion to Recuse Judge Sikora contained affidavits that absolutely challenged the judge's

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[5] Among other things, the tapes contained the objections to the attorneys for the attorney lienholders interacting with, and wrongfully gifting, the jurors.

impartiality, and noted the judge's manifest bias. In fact, pages 1 and 2 of the pre-trial Motion to Recuse (items 2 and 3) asserted as follows:

> 2. Judge Sikora has demonstrated his prejudice against [the Petitioners] as well as his bias in favor of Albert Zabin and Schneider, Reilly, Zabin & Costello, P.C., on several occasions.
>
> 3. The Picciottos have established that Judge Sikora has a social relationship with one of the plaintiffs in this action, with whom he had an ex parte communication after having assumed control of this case, such as to make it impossible for him to satisfy the standard required of a judge by 28 U.S.C. § 455(a) (expressly adopted in Massachusetts in *In re Brown*, 427 Mass. 146, 691 N.E.2d 573 (1998) that a judge avoid "even the appearance of impropriety."

The recusal motion further pled:

> The discovery that the communication between Mr. Costello and Judge Sikora (which the judge denied, but Mr. Costello had testified to under oath at deposition) in which Mr. Costello invited Judge Sikora to serve on the alumni board of Boston College Law School occurred after Judge Sikora had assumed control of this litigation in which Mr. Costello seeks substantial personal benefit, make Judge Sikora's recusal

> mandatory. See *Price Bros. Co. v. Philadelphia Gear Corp.* 629 F.2d 444 (6th Cir. 1980).

The recusal motion additionally pled:

> Both the judge's personal interests and those of his old friend Mr. Costello (who personally seeks to benefit by millions in this case) make [Judge Sikora's] continued participation in this action impossible.

26. The recusal motion was supported by affidavits of bias from Melita Picciotto, and co-defendants Juan Nunez and Stefano Picciotto.

27. The motion was further supported by the affidavit of Dana E. Casher, the trial attorney imposed on Melita Picciotto by the state court (against both of their wills), averring that she was attesting to the facts in good faith, pursuant to her *duties as an officer of the court*. At item 6 of said affidavit, Attorney Casher stated the following:

> As a final matter, in May or June, 2000, after having first learned of the social relationship between Judge Sikora and Mr. Costello at the deposition of Mr. Costello in April, I made an oral motion for the Judge to recuse himself in open court with the express intent of complying with both Rule 7 of the Mass. R. of Civ. P. (which permits an oral motion in open court) and with the common law regarding recusal which

> requires "prompt" action upon receipt of information which implicates the Court's duty to avoid "even the appearance of partiality." Judge Sikora stated that while he had, in fact, attended law school with Mr. Costello, contrary to Mr. Costello's testimony under oath and the information obtained from the law school alumni office, his only contact with Mr. Costello since 1969 was an occasional greeting in passing. And he refused to recuse himself.
>
> Signed this 12th day of September, 2001, under the pains and penalties of perjury,
>
> /S/ Dana E. Casher
> Dana E. Casher

28. Mr. Costello, as officer and major stock holder of Schneider, Reilly, Zabin & Costello, P.C., was a litigant in the action at issue.

29. The record before the Appellate Justices (the Respondents) took special pains to clearly and repeatedly identify Mr. Costello as a "plaintiff" who was "**a party**"[6] to the litigation and was personally seeking to benefit by millions of dollars through said action.

30. The fact that Mr. Costello had an improper *ex parte* meeting with the trial judge during the

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[6] All emphases were in the original documents before the state court.

pendency of the case was not contested by the attorney-lienholders during the trial of the subject action, nor did they do so during the appeal.

31. Attorney-lienholder Costello has benefited in the millions of dollars by the judgment in favor of Schneider, Reilly, Zabin & Costello, P.C., including the application of an additional $1,804,037.08, in interest alone[7]. He obtained such benefit even though his firm *caused* the litigation by serious overreaching[8], and then refused to accept payment of its judgment, after judgment entered (allowing interest to continue to accrue at 12% for several years).

The Additional Relief Sought In The Appellate Briefs

32. On page 45 of Petitioner Athena Picciotto's brief, Athena Picciotto asked the Appellate Justices (the Respondents) to review the constitutional implication of the award of post-judgment interest. The legal argument was framed on page 45 of her brief as follows:

> THE LOWER COURT ERRED WHEN IT IMPOSED . . . POST-JUDGMENT INTEREST AND COSTS

---

[7] That amount does not include the additional millions in interest that the court also awarded to the other attorney lienholders.

[8] The overreaching was barred from the jury's knowledge.

> In November of 2002, Athena Picciotto moved the state court to pay Attorney Gilleran and all of the other attorney parties, so that no "punishment" interest would continue to accrue (A. 671-686). The trial court abused its discretion by "punishing" the wrong party.

33. The Petitioners also argued in their reply brief dated September 14, 2007, that each of the attorneys should not have been allowed post-judgment interest ". . . after the time that [they] could have collected the amount of [their] judgments[s] but declined to do so." Starting on page 17 of their reply brief, the Petitioners stated the following:

> In November of 2002, Melita Picciotto and Athena Picciotto filed a motion seeking to have the judgments that had been obtained by the Attorneys paid from the settlement funds that the trial court was holding. The matter went before the single justice (McHugh, J.) and **the Attorneys opposed being paid.** By such opposition, the Attorneys became the cause of their not being able to use the monies that they had been awarded, so they should not have received any interest from and after this point.

34. After the Appellate Justices failed to address the exorbitant interest that was awarded to the

attorney lienholders in their November 18, 2008, decision and order, the Petitioners urged the Appellate Justices, through a Petition for Rehearing, to address the issue.

35. However, the Appellate Justices refused to address this important issue, and its constitutional implications.

36. The jury award to the Zabin/Costello parties was in the sum of $1,057,057.60. However, the court awarded the Costello and his firm, alone, an additional $1,804,037.08 in interest, for a total of approximately $3 million.

37. Judge Sikora imposed prejudgment and postjudgment interest upon the Petitioners and others under M.G.L. c. 231, § 6C as a result of his having converted the subject action from an interpleader action (where interest would be awarded based upon such interest as would be earned by the funds at issue while invested by the court) to one whereby the attorney-lienholders, as the designated plaintiffs, would be entitled to interest as if their recovery was for breach of contract by their former clients for not having paid them fees from the settlement proceeds. This imposition was unfair, since the former clients had no control over such proceeds once Travelers filed the interpleader action, and deposited most of the settlement funds with the court praying for the court to determine what portions of such proceeds should go to the former clients and what portions should go to the attorney-lienholders.

SUMMARY OF ARGUMENT AND

REASONS FOR GRANTING THE WRIT

Judicial integrity is a state interest of the highest order. A judge who has an improper *ex parte* meeting with a party to the litigation and deliberately conceals the improper meeting until confronted with the proof, violates 5 U.S.C.S. § 557(d)(1)(C), and further violates due process because said judge denies the other parties to the litigation their constitutional guarantees to an impartial tribunal. (Pages 22-26) A state court's manipulation of a factual uncontested court record in order to change the results constitutes an abuse of discretion. See Cooker & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 Ed. 2d 35 (1990). Litigants have a vested constitutional right to receive rulings from the state court that are based on the uncontested factual record. (Pages 16-21) The manipulation of a state court record allows for deprivation of property without due process of law. (Page 16-21) An award of interest in the millions of dollars, when funds are put on deposit in the court register through an interpleader action, constitutes an unconstitutional forfeiture. See United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998). The award is all the more egregious when the forfeiture occurs after the litigants moved the court to pay the judgments from the funds being held in the court register, but the attorney lienholders refused to accept the offer. (Pages 26-33) A trial that is conducted with jurors dressed as a circus clown, a priest, a nun, a stop

light, a court jester, etc., while the opposition treats them with candies and joke memorabilia does not constitute a fair trial before a fair tribunal. (Pages 33-35) The right to self representation in defense of one's property should be a constitutional right, however, there is split authority on this issue. (Pages 35-40) In defense of one's property, the court cannot impose an unwanted counsel who is also slated to be a material witness in the same case. (Page 35-40) Furthermore, in defense of one's property, a court cannot deny a defendant the right to cross-examine said counsel when said counsel is put on the witness stand to testify against her own client. (Page 35-40) Testimony that is not subject to cross-examination is inadmissible in criminal trials. The same standard should be applied in civil cases involving property rights. "'The right to cross-examination . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a . . . trial."; Crawford v. Washington, 541 U.S. 36 (2004).

ARGUMENT

I. THE STATE COURT MUST FURNISH A REMEDY FOR THE VIOLATION OF VESTED LEGAL RIGHTS; OTHERWISE, DUE PROCESS BECOMES A MERE FAÇADE.

A. Under The Due Process Clause Of The United States Constitution, Litigants Have A Right To Have A Legal Ruling

That Is Based On A Record That Is Accurate And Not Manipulated To Allow For An Unwarranted Result.

"Both a mistake of law and a clearly erroneous finding of fact constitute an abuse [of discretion]." Cooker & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 Ed. 2d 35 (1990). However, in the state court the Petitioners have not been able to obtain relief. Massachusetts has abolished the writ of error. The Petition for Rehearing and the Petitions for Further Appellate Review are discretionary.[9] Thus, they "do[ ] not provide a normal appellate channel." Fay, Warden et al v. Noia, 372 U.S. 391 (1963). In any case, neither the FAR nor the Petitions for Rehearing were granted. Thus, the Petitioners are stuck with a ruling by a Massachusetts Appellate Panel that should have been reviewed for abuse of discretion,[10] but was not.

Due process demands that the State cannot create a false record and then use that false record to deprive citizens of their property, especially when the State is the judiciary, *i.e.*, the third branch of government. Creating a false record for the financial benefit of insiders of a court "represents a significant departure from the normal appellate process . . ." ; Walker v. A. L. Lockhart, Superintendent of the Arkansas Department of Corrections, 726 F.2d 1238 (8th Cir. Ark. 1984) and constitutes "constitutional errors of great magnitude." Walker v. A. L.

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[9] *See* Mass. R. App. P. 27 and Mass. R. App. P. 27.1

[10] *See* Cooker & Gell v. Hartmarx Corp., *supra*.

Lockhart, Superintendent of the Arkansas Department of Corrections, *supra.* Thus the subject action should have been reviewable by the Massachusetts SJC, given said court's power of superintendence of its lower courts. *In re* DeSaulnier, 274 N.E.2d 454, 360 Mass. 757 (1971). However, the Massachusetts SJC refused, even though U. S. Supreme Court Chief Justice Marshall has stated:

> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

The false facts that the Respondents created on which to base their rulings violated "the basic requirement of due process"; *In re* Murchison, 349 U.S. 133 (1955).

B. The Respondents Have Conceded That They Based Their Ruling On Their Changes to The Uncontested Factual Record That Was Before Them, And That The Uncontested Factual Record Demonstrates That The Trial Judge Had An Improper Ex Parte Meeting With A Party To The Litigation During

The Pendency Of The Case, And Tried To Hide It From The Defendants.

Yet, in their decision of November 18, 2008, which is reported as Zabin et al v. Picciotto et al, 73 Mass. App. Ct. 141; 896 N.E.2d 937 (2008) Mass. App. LEXIS 1135 [*see* item d. at Pet. App. 40a - 41a], the Respondents (Appellate Justices) wrongly stated as follows:[11]

> d. The defendants contend that the judge met, outside the courtroom, with **a partner of one of the attorneys representing the plaintiffs**, for the purpose of discussing the possibility of the judge becoming a trustee of the board of alumni at the law school from which both had graduated. There is no allegation that the instant litigation was mentioned during the meeting. Even accepting the allegation as true, **there is no suggestion in the record** that the judge pursued the possibility, or **that any feature of the encounter raises a question of the judge's impartiality**. See Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 551-552 (1998). We discern no due process violation.

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[11] (Emphases is added to reflect the Respondents' factual errors and changes to the uncontested record]

The above findings and rulings of the Massachusetts Appeals Court are in **direct contradiction** of the written factual uncontested record that was before the court. It was repeatedly made clear to the Respondents that the party who had the improper *ex parte* meeting with the judge, Robert V. Costello, was strictly in the capacity of a "plaintiff" party in the underlying action, and that there were several pre-trial affidavits of bias filed with the court, not only by the defendants, but their trial attorney.[12]

The Respondents were further provided with a sworn affidavit from the trial attorney attesting to the trial judge's creation of a false record, his refusal to allow a stenographic record, and his false statements to the jury during the trial.[13]

It should be noted that during the period of time that Judge Sikora had jurisdiction over the subject action, he was actively seeking to be elevated to a higher court. Mr. Costello was in a position to influence and facilitate such an advancement. In Massachusetts, judges are not elected, but are proposed by a Judicial Nominating Commission, which is made up, for the most part, of attorneys, and no public access to the decision-making or as to who may have influenced the decision is allowed. However, after the trial, but during the time that he still had jurisdiction over the case, Judge Sikora was nominated to be a justice in the very same

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[12] After the *ex parte* meeting, Judge Sikora assumed his own *de facto* assignment, without complying with the requirements of Massachusetts Superior Court Standing Order 9-80.

[13] There were no countervailing affidavits to any of the facts.

Massachusetts Appeals Court that rewrote his state court record.

As stated in the facts, the trial judge divested himself of in *rem* jurisdiction of the interpleader action and, converted the action, while leaving the Petitioners with the reasonable belief that they were still involved in an interpleader action pursuant to Mass. R. Civ. P. 22, and would be entitled to timely present claims to their own settlement funds to a jury. Judge Sikora barred them that right, and he made false rulings that ensured the Petitioners would be left with very small portions of the amounts for which they had settled their claims, if any. Owing to the favorable rulings and conduct of Judge Sikora, Mr. Costello's firm (Schneider, Reilly, Zabin & Costello, P.C.) was awarded $1,804,037.08 above and beyond what the jury awarded his firm.

That, combined with the other evidence in the subject case, would lead an impartial fact finder to the reasonable conclusion that there was much more that occurred in the improper *ex parte* meeting than either party disclosed to the Petitioners, and that due process was violated when the trial judge first concealed, and then denied, the truth of his *ex parte* meeting with Mr. Costello, and then refused to recuse himself from the case.

The action of the trial judge and Mr. Costello constitutes a violation of 18 U.S.C. § 1341 and 18 U.S.C § 1346. The trial judge "had a duty to perform impartially, without affording either side an unfair advantage or secret access to the court.'"; United States of America v. Bobby B. DeLaughter (2009) U.S. Dist. LEXIS 48483. Mr. Costello, as an officer of the Massachusetts courts, had an ethical duty to

refrain from wrongly contacting and/or influencing his trial judge. Massachusetts SJC Rule 3:07 § 3.4(a)(b) specifically prohibits *ex parte* communications with a judge seeking to influence said judge.

Due Process Requires That A Judge Cannot Have An Improper Ex Parte Meeting With A Party To The Litigation

"When an ex parte communication occurs, the Sunshine Act requires disclosure of the communication . . ." 5 U.S.C.S. § 557(d)(1)(C). There are no exceptions to the disclosure requirement." Electric Power Supply Association, Petitioner v. Federal Energy Regulatory Commission, Respondent Massachusetts Municipal Wholesale Electric Company, Et Al., Intervenors, The District Of Columbia Circuit, 391 F.3d 1255; 364 U.S. App. D.C. 48 (2004). Judge Sikora's deliberate concealment of the improper *ex parte* communication violates due process.

"By engaging in ex parte communications with litigants, a judge denies the parties the safeguards afforded them as well as their expectations that they can present evidence to an unbiased trier of fact, thereby disrupting the requirement of order and decorum in proceedings before the judge."; Commission On Judicial Performance V. Joseph Lewis No. 2004-Jp-01002-Sct Supreme Court Of Mississippi, 913 So. 2d 266 (2005).

In the recent Supreme Court case of Caperton v. Massey, 1556 U.S.___ ; 129 S.Ct. 2252: 173 L.Ed.2d 1208; 2009 U.S. LEXIS 4157, the United States Supreme Court ruled that the question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, and "not on the judge's perception of the ability to act fairly." Certainly a judge who meets *ex parte* with a plaintiff to the litigation but tries to conceal the meeting, conducts a "circus-like" trial with jurors dressed in Halloween costumes, and allows the attorneys for the party he met with to gift jurors with joke memorabilia and candies, gives the impression that the judge lacks the ability to conduct a trial with proper decorum and act fairly. Moreover, in the recent Caperton v. Massey case, *supra*, the Supreme Court went on to rule:

> Courts in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. **Judicial integrity is, in consequence, a state interest of the highest order**." *Republican Party of Minn. V. White*, 536 U.S. 765, 793 (2002) (KENNEDY, J. concurring) [Emphases added]

If the Due Process Clause requires recusal only when a party could prove actual bias arising from personal animus in the judge's heart or cold cash in the judge's pocket, then the rights of parties to a fair and impartial judge would be imperiled. Probabilities of unfairness, likelihood of bias, and unacceptable perceptions are at the heart of circumstantial evidence, which is sometimes the only evidence available on the issue of whether a judge is constitutionally required to disqualify. Few of the cases of the Supreme Court of the United States involving due process challenges to a judge involve direct evidence of bias; instead, they involve circumstances where the probability of judicial bias is intolerable, regardless of the particular judge's actual state of mind. When a challenge was lodged to a conviction rendered by a judge and mayor who received nothing for acquittal, the Court held: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average mans as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927). The Supreme Court did not consider whether the adjudicator was actually biased. Rather, the Court evaluated *the circumstances* and decided that the probability of bias for this judge was too great for the Constitution to countenance.

Due process would risk being a mere façade if it ignored all concerns about "the probability of unfairness." Withrow v. Larkin, 421 U.S. 35, 47 (1975); "[not] only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (quoting In re Murchison, 349 U.S. 133, 136 (1955). Fairness of course requires an absence of actual bias in the trial of case. But our system of law has always endeavored to prevent even the probability of unfairness.

"The requirement of neutrality has been jealously guarded by the Supreme Court." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). To give litigants the benefit of an unbiased and impartial judge, the Constitution forbids procedures that create the possibility that prejudice will result. *See* Connally v. Georgia, 429 U.S. 245, 250-251 (1977); ("even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias."); Turner v. Louisiana, 379 U.S. 466 (1965). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties."; In re Murchison, 349 U.S. at 136.

The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was such likelihood of bias or an appearance of bias that the judge was unable to hold the balance . . . "; Taylor v. Hayes, 418 U.S. 488, 501 (1974), quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964).

The appearance of likely bias is relevant not solely to public perception and confidence in the judicial system, but may be the only evidence of actual bias. Often there is simply no provable evidence of actual bias; even the judge might be unconscious of its presence. Indeed, appearances arising from specific facts may be the only indication that actual bias is present in fact. While there is a presumption of integrity in the judiciary, the very fact that it is merely a presumption indicates that in some situations it can and will be overcome. Thus, in evaluating whether a judge's potential bias violates a litigant's due process rights, the question is not whether a judge may be able to resist the temptation of partiality. Rather, the question is whether a judge could possibly even be tempted under the circumstances.

C. Ordering Litigants To Forfeit Millions Of Dollars In Excessive Punitive Interest And Costs, Even Though The Money Was Put On Deposit In The Court Register For An Interpleader Action, Is In Violation Of The Eighth Amendment And The Fourteenth Amendment Of The United States Constitution.

The court-deposited settlement proceeds were at all times in the control of the court. The jury award to the Zabin/Costello parties was

$1,057,057.60 However, the court's award of 12% interest and costs enriched the Costello/Zabin parties by an additional $1,804,037.08 "If the amount of the forfeiture is grossly disproportional to the gravity of the triggering offense, it is unconstitutional."; United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

The Respondents' actions have caused serious injury and have substantially affected the property rights of the Petitioners, including, but by no means limited to, violations of the guarantees of the Eighth Amendment of the U.S. Constitution (which is applicable to the states under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution); Copper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434, 121 S.Ct. 1678, 149 L.Ed. 2d 674 (2001)). The Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, as a punishment for some offense."; United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

In addition to the issue of Costello's unfair overreaching to force the former clients of his firm into court [14], forcing the litigants to forfeit millions of dollars to insiders of the court through a post-judgment "punishment" interest even though:

- the settling parties had been induced to agree to the court deposit on the premise that it would be an *interpleader action*, which would

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[14] (which the trial judge barred from the jurors' knowledge)

result in interest being added to amounts determined to be owed from the funds at issue only at the rate earned by such funds while invested by the court in which the funds were deposited;

- the Petitioners had moved to pay the attorney-lienholders their judgments[15];
- the attorney-lienholders refused to accept payment of their judgments; and
- After the Respondents, themselves, found that the settling parties had no control over and "did not have access to the settlement proceeds" held by the court. [16]

This constitutes a type of punishment that is prohibited under the Eighth Amendment of the United States Constitution.

Other courts looking at this issue of law have ruled that, ". . . interest is not allowed on the fund in question for the period during which it is on deposit in the registry of the court." Powers v. Metropolitan Life Insurance Company, 142 App. DC 95m 439 F2d 605 (1971), quoting 45 Am.Jur.2d Interpleader § 40 (1969); Anno. 15 A.L.R.2d 473 (1951). *See also* Osborn v. Bank of United States, 22 U.S. (9 Wheat.)

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[15] The Petitioners moved the state court to pay the attorney parties their judgments as far back as 2002. Moreover, during the time at issue, the money was in the court register, and the Petitioners had no possession or control of that fund.

[16] *See* ruling of the Respondents in Zabin v. Picciotto, 73 Mass. App. 141; 896 N.E.2d 937 (2008) [paragraph 2 of App. 48a and line 3 at App. 49a]

738, 6 L. Ed. 204 (1824). *See also* Amoco Transport Company v. Dietze, Inc., 582 Fed. Supp. 804 (1984); and AMC 2586 (SD NY 1984).

Yet, the State provided a statutory 12% interest[17] award to the Costello/Zabin parties, pursuant to Massachusetts statute M.G.L. c. 231 § 6C. This Court is requested to rule on whether 12% statutory interest should be added with respect to an award of attorneys' fees from clients' settlement proceeds that have been deposited with a court when such proceeds have only earned interest at a rate of approximately 1% while invested by the court.

D. The Respondents Have Conceded That They Erred In Reviewing The Prayers For Relief That Were Submitted To Them Through The Appellate Briefs, And That Substantial Harm Resulted, But They Arbitrarily Refused To Grant Any Relief.

The Respondents stated that they based their decision and order on the written record. Yet, on page 20, footnote 26 of their ruling and order of November 18, 2008, the Respondents stated as follows:

> The defendants' separate contention that postjudgment interest should not have accrued, because no final judgment

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[17] The money on deposit in the court register was earning approximately 1% per annum.

entered is disposed of by our conclusion, *supra*, that final judgment did enter.

Said findings and ruling of the Respondents are in direct contradiction to the arguments and prayers for relief that the Petitioners had set forth in an effort to cause them to address the award of such excessive interest. The Petitioners argued, among other things, that they were led to believe that, if they agreed to allow the settlement proceeds to be deposited into the court, interest would accrue at the rate generated by the court's investment of such proceeds. The Respondents have ignored the Petitioners' argument that changing the rules, after the fact, and without notice to the settling parties, in order to take away from them millions of dollars more than the jury awarded, is unjust. It constitutes an excessive fine, and a deprivation of property without due process of law, in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

The uncontested written record in front of the Respondents establishes that:

1. After the judgment was entered on October 24, 2002, the Petitioners moved the Suffolk Superior Court to pay the attorney-lienholders their judgments, including their pre-judgment interest and costs, and release the remaining funds to all of the defendants (the former clients) in said action.

2. The attorney-lienholders opposed the motion and refused to accept the money.

Therefore, the award to the attorney-lienholders of the amounts of post-judgment interest that they received constitutes a deprivation of the former clients' property without providing such former clients with due process of law. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); see also Fuentes v. Shevin,407 U.S. 67 (1972); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); and Cf. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). As occurred in the instant case, the over-reaching strategy of the attorney-lienholders, and the attendant tainted litigation, creates a condition in which attorneys receive the injured Petitioners' entire settlements[18], and the Petitioners will receive nothing.[19]

After Costello's firm obtained a judgment of $1,057,057.60, but subsequently refused to be paid from the settlement proceeds being held by the court, the court awarded said firm an additional $1,804,037.08 in interest, for a total of nearly $3

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[18] The counsel Judge Sikora imposed against the Petitioner Melita Picciotto's will, charged Ms. Picciotto $3.5 million dollars to defend her from the overreaching of the prior attorneys.

[19] The Respondents also misunderstood the facts on the amount of money that the Petitioners received. The state court specified that the money it was releasing was to be used by the attorneys who represented the Petitioners and be released to other parties in the underlying case. That attorneys charged more than $3.5 million, for the defense, leaving the Petitioners in poverty, causing the loss of their home, and owing attorneys far more than the sums they had settled for, after forcing them into a litigation that they had made all reasonable efforts to avoid.

million to that firm alone. Because of the interest award, the other attorney-lienholders were also enriched by millions of dollars over the jury award. Furthermore, because of the legal fees charged to defend, the Petitioners now owe far more than they settled for.

Such award of interest was made even though the Massachusetts Appeals Court held that the Petitioners (and the other settling parties) could not be charged with having wrongly retained the money that was awarded to the attorney-lienholders by ruling as follows:[20]

> As a strictly technical matter [the Petitioners] did not obtain control of the settlement proceeds upon the conclusion of the settlement agreement with Travelers . . . as we have discussed above, several of the plaintiffs sought fees in quantum meruit . . . unless and until the competing claims of the various attorney lienholders were determined [the Petitioners] did not have access to the settlement proceeds. Pending final judgment in the present litigation, [the Petitioners] w[ere] not in breach of arrangement . . .much less guilty of unfair or deceptive acts or practices by reason of [their] failure to pay [the attorney lienholders].

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[20] *See* ruling of the Respondents in Zabin v. Picciotto, 73 Mass. App. 141; 896 N.E.2d 937 (2008) [*see* paragraph 2 of Pet. App. 48a and top paragraph at App. 49a]

Furthermore, an interest award that doubles or trebles the amount of a judgment that the Petitioners had offered to pay, but that the opposition refused to accept, is unduly punitive, and in violation of the Eighth and Fourteenth Amendments of the United States Constitution.; *see* United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

E. Due Process Is Violated When A Trial Devolves Into A "Circus" Of Jurors Wearing Halloween Costumes And The Trial Judge Allows The Opposition To Pass The Jurors Candy And Joke Memorabilia.

The trial judge allowed the jurors to come to court and listen to testimony for an entire day while dressed as, among other things, a priest, a stop light, a nun, an English judge (with a wig), court jesters and clowns. Thereafter, the courtroom atmosphere became more like a big party than a somber court proceeding. The lawyers representing the attorney-lienholders interacted inappropriately with the jurors, passed candies to them, praised them for their wonderful costumes, informed them they were "the talk of the courthouse." They also passed the jurors a suggested cast list as to who would play each of the participants in the trial, suggesting that the trial eventually would be turned into a movie. They further passed out joke bumper stickers to the jurors.

The Petitioners were beyond disheartened; they were literally sickened by it. It was obvious to them just what was being celebrated: the wrongful transfer of property.

Petitioner Melita Picciotto instructed her court-imposed counsel to object, and to seek a mistrial.[21] The Petitioner informed court-imposed counsel that she had never consented to such a spectacle and it upset her. Furthermore, the continuous personal interactions of the attorneys who represented the attorney-lienholders and their continuous gifting to the jury was unacceptable. Attorney Casher has averred under oath that she had objected to Attorney Rossman and Attorney Stone (the attorneys for Costello's firm) passing candies to the jurors. The objections and the motion for a mistrial, as have so many other portions of the record, have disappeared, *i.e.*, the court reported the trial tapes "lost."[22]

In a trial a party is entitled to judicial serenity and calm. *See* Estes v. Texas, 381 U.S. 532, 536 (1965). Court proceedings are held for the solemn

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[21] The trial judge also had the American flag removed from his courtroom, so sworn testimony was provided to the jury without the requisite American flag present.

[22] The Respondents addressed this issue by stating that since there was no record of it in the trial transcript, the Petitioners had lost their appellate rights on the argument. However, the tapes that contained the objection were "lost" while in the possession of the court, and the opposition did not contest that the incident occurred. Moreover, the Petitioners' trial attorney averred in the underlying record that the conduct had occurred, and that she had objected to it.

purpose of endeavoring to ascertain the truth, which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and to facilitate the performance of this high function. To perform its high function in the best way 'justice must satisfy the appearance of justice.

The non-solemn atmosphere, indeed what the press characterized as a "circus" environment, does not comport with a fair trial. Furthermore, the court's allowance of the attorney-lienholders' lawyers to interact with jurors in an overly-friendly, jovial, and influence-peddling way undermined the entitlement of the Petitioners and the other settling parties to a fair trial.

F. The State Court Judgment Violated Due Process Because The State Court Deprived Petitioner Melita Picciotto Of The Right To Represent Herself In Defense Of Her Property, Imposed Counsel Upon Her Who Was Ordered To Be A Material Witness Against Her At Trial, And Then Denied The Petitioners The Right To Cross-Examine Said Counsel/Material Witness At Trial.

Pre-trial, Petitioner Melita Picciotto moved on an emergency bases to be allowed to represent herself in the subject action, citing a constitutionally guaranteed right to self-representation. On October 13, 2000, another state court judge (Volterra, J.)

agreed, and ordered that that the Petitioner be allowed to represent herself *pro se* in the subject action and that Judge Sikora be notified of his decision. Judge Sikora refused to honor the ruling, and informed the Petitioner that she did not speak in his court *as a matter of right* but subject to his "grace." His position was that the Petitioner had no right, constitutional, civil, or otherwise, to speak in his court in defense of her property, irrespective of what another judge had ruled. In the ultimate display of bias, when she tried to speak, Judge Sikora openly stated on the record that his only interest was in hearing from the attorney parties, and not from the Petitioner.

"Authorities are split on whether there is a constitutional right to proceed pro se in civil cases." University of Chicago Law Review, 55 U. Chi. L. Rev. 659 (Spring 1988), quoting Fordham Law Review, 55 Fordham L. Rev. 1109 (May 1987):

> See Adams, 317 U.S. at 279 (answering affirmatively); Garrison v. Lacey, 362 F.2d 798, 799 (10th Cir. 1966) (same), cert. denied, 387 U.S. 911 (1967). But see Andrews v. Bechtel Power Corp., 780 F.2d 124, 137 (1st Cir. 1985) (answering negatively), cert. denied, 106 S. Ct. 2896 (1986); O'Reilly v. New York Times, 692 F.2d 863, 867 (2d Cir. 1982) (same). Legitimate arguments have been advanced for both sides. Compare Comment, On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules, 132 U. Pa. L. Rev. 1515, 1531-32 (1984)

> (constitutional right to appear pro se in civil cases), with Kaufman, The Right of Self-Representation and the Power of Jury Nullification, 28 Case W. Res. 269, 271 n.7 (1978) (no constitutional right to appear pro se in civil cases). The Faretta court reasoned that criminal defendants have the right to appear pro se because the criminal defendant personally bears the consequences of defeat and that to thrust a lawyer on a criminal defendant is likely to convince him that the justice system is against him. See Faretta v. California, 422 U.S. 806, 834 (1975).

In 1777, Thomas Paine argued that the right to represent oneself in civil cases was a natural right. And that the right to defend one's life, liberty, or property by oneself, is among those fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions. The controversy continues. In the case of Salvador Martinez v. Court of Appeals California 4th Appellate District, 528 U.S.152, 165 (2002), while concurring in the Judgment of the majority of the Court, which upheld Ferreta, Justice Scalia stated, "While I might have rested my decision upon the Due Process Clause rather than the Sixth Amendment, I believe it was correct." Salvador Martinez v. Court of Appeals California 4th Appellate District, *supra.* Since a controversy exists, this Court should clarify

whether or not the right of self-representation in defense of one's property is a constitutional and due process right.

Furthermore, the Petitioner informed the state court that she was firing the court-imposed counsel because she had committed malpractice. Judge Sikora stated that he felt it was "a ploy," even though he later ruled that because the court-imposed counsel had failed to file the proper pleadings, the Petitioner had no claim to her own court-deposited settlement proceeds, so her claims could not go to the jury in the action. As a result, the Petitioner's property has been distributed to attorneys who never represented her in any action.

The Petitioner also informed the court that she objected to the court-imposed counsel's representation because the Petitioner believed that said counsel was being forced to represent conflicting interests between said counsel's clients, as well as herself, which rendered her representation of the Petitioner ineffective. This conflict is something that even the court-imposed counsel admitted to Judge Sikora, citing it as a reason she was not comfortable representing the Petitioner.

Further, the Petitioner objected to being represented by an attorney who was slated to testify against her at trial where the court would not allow the Petitioner (or anyone) to cross examine the attorney. Judge Sikora still refused to honor Judge Volterra's ruling, or the provisions of either the Massachusetts or the United States Constitution. After said counsel had been called as a witness by

the attorney-lienholders, the Petitioner moved to be allowed, at the very least, to cross-examine her court-imposed counsel while sais counsel was *on the stand* at the trial. Judge Sikora refused, no matter how brief such cross-examination would be.

The factual, uncontested record in front of the Respondents clearly and unambiguously showed that:

> 1) The Petitioners were not represented by counsel at Attorney Casher's deposition;
>
> 2) The deposition of Dana Casher was suspended and adjourned by the attorneys who took Ms. Casher's deposition before their direct examination of Ms. Casher had been concluded;
>
> 3) Therefore, there never was an opportunity afforded for the counsel for Dana Casher or for the Petitioners to cross-examine Ms. Casher in her deposition;
>
> 4) As a result, Dana Casher's deposition testimony was never subjected to cross-examination; and
>
> 5) Consequently, the Respondents based their decision as to the deposition on erroneous "facts," and never addressed the issue raised by the Petitioners that it was error to allow prerecorded testimony of their trial attorney to be introduced into

> evidence that had not been subjected to cross-examination.

The right of cross-examination is *fundamental* to the fair treatment of parties in litigation. Parties to litigation are entitled, as a matter of right, to the reasonable cross-examination of witnesses used against them for the purpose of attempting to impeach or discredit their testimony.

Since the deposition of Attorney Casher was suspended and adjourned by the plaintiffs in the underlying action, the testimony of Petitioners' attorney that was admitted constituted an *ex parte* examination. *See* Crawford v. Washington, 541 U.S. 36 (2004).

Testimony that is not subject to cross-examination is inadmissible at trial; "The right to cross-examination . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a . . . trial."; Crawford v. Washington, *ibid.* "A witness . . . [during cross examination] . . . might refine, reformulate, reconsider, or even recant earlier statements."; Melendez-Diaz v. Massachusetts, 557 U.S. ____ (2009). However, this Court has not been explicit if said right applies only to criminal defendants, therefore the petitioner is seeking a ruling on that issue.

CONCLUSION

An intermediate appellate court is not a fact finder court, and cannot change the uncontested factual record that is before them. The Petitioners have a legal right to obtain a ruling that is based on the facts. *See* Cooker & Gell v. Hartmarx Corp., *supra*. The facts of this case prove that the trial judge used his position of power to enrich a social friend of his who was a party to the litigation. That triggers the guarantees of the federal constitution. However, with the writ of error abolished in most states, there is no mandatory review, *i.e.*, no remedy at law to correct intermediate state court rulings based on fabricated records. This court must establish guidelines to provide a remedy for such wrongs. Judicial integrity is a national and state interest of the highest order. Therefore, this Court should issue writ.

Respectfully submitted,

Melita Picciotto
Judith Picciotto
Stefano Picciotto

September 2, 2010

APPENDIX A – OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED JUNE 9, 2010

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

STEFANO PICCIOTTO & others[1]
vs.
APPEALS COURT (No.2)

SJC-10600, SJC-10601, SJC-10602

June 9, 2010

Supreme Judicial Court. Appeal from order of single justice.

Practice, Civil. Relief in the nature of certiorari.

Stefano, Judith, and Melita Picciotto appeal from judgments entered by a single justice of this

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[1] Judith Picciotto and Melita Picciotto

court denying their petitions for relief in the nature of certiorari, G. L. c. 249, § 4. We affirm.

In 2008, the Appeals Court decided an appeal adversely to the Picciottos. See Zabin v. Picciotto, 73 Mass. App. Ct. 141 (2008). The Picciottos filed petitions for rehearing and moved that the Appeals Court "correct the record," to no avail. They also twice applied for further appellate review, which this court denied. See Zabin v. Picciotto, 453 Mass. 1105 (2009); Zabin v. Picciotto, 453 Mass. 1103 (2009). Thereafter, the Picciottos jointly filed three petitions in the county court challenging the Appeals Court's decision in various respects. Common to all three petitions was their request that a single justice of this court order the Appeals Court "to correct [its] misunderstanding of the factual record in their decision" and to decide the appeal "on the factual record that was actually before [it]." The Picciottos moved for summary judgment on their petitions and requested a hearing. The single justice denied the petitions without a hearing.

We agree with the single justice that the Picciottos were not entitled to relief pursuant to G. L. c. 249, § 4, because they could adequately obtain review of their claims through other available paths: petitions for rehearing and applications for further appellate review. See Genninger v. Commissioner of Correction, 419 Mass. 1009, 1010 (1995). The Picciottos in fact pursued those paths, albeit unsuccessfully. That those paths were unfruitful did not entitle them to relief in the nature of certiorari. See G. L. c. 249, § 4 (certiorari relief designed to correct errors "not otherwise reviewable by motion or

by appeal"); Picciotto v. Superior Court Dep't of the Trial Court, 437 Mass. 1019, 1020 (2002), quoting G. L. c. 249, § 4 ("certiorari does not provide an additional or alternative avenue of appellate review . . . [its] purpose is to correct errors that 'are not otherwise reviewable by motion or by appeal' "). The single justice thus neither abused his discretion nor otherwise erred in denying the petitions without a hearing.[2]

Judgments affirmed.

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[2] The single justice whose decisions are the subject of these appeals has joined the quorum in these cases because, three other justices having recused themselves, his participation was necessary to secure a quorum. See Mass. R. A. P. 24(b), 365 Mass. 872 (1974).

APPENDIX B – OPINION OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED NOVEMBER 18, 2008

COMMONWEALTH OF MASSACHUSETTS

06-P-1419
07-P-842

Appeals Court

ALBERT ZABIN & others[1] vs. STEFANO PICCIOTTO & others [2]
(and a companion case[3]).

Nos. 06-P-1419 & 0-P-842

Suffolk. March 19, 2008. – November 18, 2008

Present: Green, Graham & Gringer, JJ

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[1] Schneider, Reilly, Zabin & Costello, P.C.; Joel Eigerman; Michael Gilleran; Gilleran & Mortensen, P.C.; Pepe & Hazard LLP; Edwin McCabe; McCabe Brown & Davis, P.C.; and Edward Greer.

[2] Judith Picciotto, Melita Picciotto, Athena Picciotto, and Foreign Car Center, Inc. Juan Nunez was a plaintiff in the underlying action but did not participate in this appeal.

[3] The defendant Melita Picciotto also appeals from an order of the single justice entered on May 1, 2007. That appeal is entered on the docket of this court as no. 2007-P-842.

Jurisdiction. Judgment, Implementing settlement agreement. Evidence. Relevancy and materiality, Medical record. Contract, Settlement agreement, Compensation of attorney, Contingent fee agreement. Attorney at Law, Attorney-client relationship, Compensation, Contingent fee agreement. Damages, Quantum meruit, Interest. Interest, Privileged Communication. Waiver. Practice, Civil, Interest, Deposition, Discovery, Assistance of counsel, Transcript of testimony, Record. Due Process of Law. Consumer Protection Act. Unfair or deceptive act.

Civil action commenced in the Superior Court Department on April 7, 1999.

The case, as superseded by separate complaints filed by the various plaintiffs, was tried before Mitchell J. Sikora, Jr., J., and was later consolidated with an appeal from an order of a single justice entered by McHugh, J.

Melita Picciotto, pro se.

George E. Richardson for Foreign Car Center, Inc.

Danielle de Benedictis for Athena Picciotto.

Timothy J. Dacey (Douglas K. Mansfield, Thomas J. Gallitao, & Scott D. Burke with him) for Edward Greer & others.

Michael J. Stone (Susan E. Cohen with him) for Schneider, Reilly, Zabin & Costello, P.C. & another.

Timothy O. Egan (Robert T. Gill with him) for Joel Eigerman & another.

Judith Picciotto, pro se. was present but did not argue.

Stefano Picciotto, pro se, was present but did not argue.

GREEN, J. Following a lengthy trial, a Superior Court jury returned a verdict in favor of the plaintiffs on their respective claims for recovery of attorney's fees, and against the defendants on their counterclaims for malpractice and related claims. Thereafter, the trial judge (who had reserved the parties' claims and counterclaims under G. L. c. 93A) ruled that the various c. 93A claims should be dismissed. On appeal, the defendants raise numerous claims of error. In addition, the plaintiff Joel Eigerman asserts that the judge erred in concluding as matter of law that an attorney may not maintain an action against a former client under c. 93A, based on actions arising out of the former attorney-client relationship. We discern in the defendants' various claims of error no grounds for reversal of the judgment in the plaintiffs' favor on their claims for attorney's fees, and accordingly affirm the judgment as to such claims. We likewise affirm the judgment in the plaintiffs' favor on the defendants' various counterclaims. We affirm the judgment in favor of the defendant Foreign Car Center, Inc. (FCC), on Eigerman's claim under c. 93A, though we do so on grounds other than those relied upon by the trial judge. Finally, we affirm the orders of the single justice that are before us, with one modification.

1. Background. We summarize briefly the tortuous history of the litigation preceding the present appeal, to furnish context for our review of the trial itself. On March 24, 1983, FCC, its owners

Stefano Picciotto and his wife, Judith Picciotto, [4] and FCC employee Juan Nunez filed a complaint in the Superior Court, alleging that they had sustained damages during the late 1970s and early 1980s, as a result of emissions from the operations of a leather finishing plant operated by Salem Suede, Inc. (Salem Suede), on property adjacent to FCC.[5] After a lengthy period of dormancy, a jury trial in September, 1993, produced a verdict in their favor, and awarded them substantial damages. [6] The judgment was affirmed on appeal, and we refer to the opinion in that appeal for further description of the facts underlying the 1983 complaint. See Foreign Car Center, Inc. v. Salem Suede, Inc., 40 Mass. App. Ct. 15, 660 N.E.2d 687 (1996).

The plaintiff Albert Zabin served as trial counsel in the 1983 action, under a written contingent fee agreement. In 1994, after judgment entered in the 1983 action but before disposition of the appeal, Stefano asked Zabin to file a complaint against Salem Suede based on injuries suffered by his daughters, the defendants Melita and Athena. Zabin filed a complaint but withdrew his appearance when Stefano failed to provide him with medical records substantiating the claimed injuries. In April, 1996, after this court affirmed the judgment

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[4] Where necessary, we will refer to the members of the Picciotto family by their first names, not out of disrespect but in the interest of clarity.

[5] Another FCC employee, Jose B. Ferreras, joined in the 1983 complaint but is not a party to the present action.

[6] With prejudgment interest, the damages totaled $ 1,296,641.

in the 1983 action and the Supreme Judicial Court denied Salem Suede's application for further appellate review, Zabin filed suit against Salem Suede and The Travelers Indemnity Company, Inc. (Travelers), seeking to collect the judgment, and claiming that Travelers had engaged in unfair claims settlement practices. After Salem Suede sought protection by means of a petition under Chapter 11 of the Bankruptcy Code, the Picciottos filed an action for legal malpractice against Zabin. Zabin withdrew as their counsel, and the Picciottos engaged the plaintiff Joel Eigerman to represent them in the bankruptcy action. By early 1997, Eigerman's relationship with the Picciottos had deteriorated, and the bankruptcy judge granted him leave to withdraw as their counsel. The Picciottos engaged the plaintiff Michael Gilleran in replacement. In April, 1997, Travelers moved for summary judgment on the grounds that the Picciottos' claims were excluded from coverage under a pollution exclusion clause contained in Salem Suede's policy with Travelers. In October, 1997, the bankruptcy judge denied Travelers's summary judgment motion, citing disputed issues of fact material to the application of the pollution exclusion clause to the Picciottos' claims. In her memorandum of decision, the bankruptcy judge offered extensive commentary adverse to Travelers relative to the unfair claims settlement practices issue.

During the summer of 1997, while awaiting the bankruptcy judge's decision on Travelers's summary judgment motion, the Picciottos asked Gilleran to file a proof of claim in the Bankruptcy Court on behalf of Melita and Athena. After Gilleran did so, the court scheduled an evidentiary hearing to

estimate the value of the claims. Gilleran engaged a personal injury attorney to assist him in presenting evidence on the claims. However, after reviewing available records, the attorney advised Gilleran that he could find no evidence that Melita or Athena had been injured by emissions from Salem Suede. As with his predecessor counsel, Gilleran's relationship with the Picciottos deteriorated, and in January of 1998, the Picciottos sent Gilleran a letter accusing him of legal malpractice in his representation of them. Gilleran was granted leave to withdraw as counsel and was replaced by the plaintiff Edwin McCabe.

McCabe's relationship with the Picciottos was short lived and marked by friction. In May of 1998, he was granted leave to withdraw, and the Picciottos engaged attorney Dana Casher to replace him.[7]

In June, 1998, the United States District Court for the District of Massachusetts rejected Travelers's appeal from the Bankruptcy Court's denial of summary judgment. See In re Salem Suede, Inc., 221 B.R. 586 (Bankr. D. Mass. 1998).

On January 6, 1999, Travelers agreed to pay to the Picciotto parties (including Juan Nunez) a lump sum of $ 9 million, in full settlement of all claims against Travelers, Salem Suede, and all affiliates of Salem Suede (including Salem Suede's owner, Alan Zion). The settlement was reflected in a written settlement agreement, executed by Travelers, Salem

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[7] Casher also represented the Picciottos through trial in the present action.

Suede, Zion, and the defendants and Juan Nunez.[8] As a condition precedent to payment of the settlement, the settlement agreement required the defendants to resolve any outstanding claim that might constitute a lien on the settlement proceeds, including any claims for attorney's fees. Settlement efforts with the plaintiffs were unsuccessful, and Travelers on April 7, 1999, filed an action for interpleader to resolve the competing claims to the proceeds.[9]

After the plaintiffs and defendants filed responsive pleadings to Travelers's interpleader complaint, asserting a variety of claims and cross claims, a judge of the Superior Court entered an order realigning the parties, and directing the parties to file new pleadings. The purpose of the

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[8] A variety of other parties affiliated with Zion and/or Salem Suede also joined in the settlement agreement. Their identities are not germane to any issue in this appeal.

[9] In 1994, Stefano and Judith engaged the plaintiff Edward Greer to bring an action against BayBank and Alan Zion (Salem Suede's owner), seeking damages arising from an alleged conspiracy incident to BayBank's efforts to collect a loan extended by the bank to FCC and secured by the Picciottos' home. Dissatisfied with Greer's representation, the Picciottos discharged him, and engaged the plaintiff Joel Eperman. Eventually, BayBank obtained a summary judgment, which this court affirmed on appeal. See Picciotto v. BayBank, 46 Mass. App. Ct. 1119, 708 N.E.2d 153 (1999). The threatened foreclosure was delayed during the pendency of the action (including the appeal). Stefano and Judith used a portion of the proceeds of the Travelers settlement, released apparently pursuant to an amendment to the original settlement agreement, to satisfy the BayBank debt and avoid foreclosure. Over the course of proceedings in the Superior Court, a total of $ 4.25 million was released to the Picciotto parties.

order appears to have been to streamline the action, by framing the claims for attorney's fees by the plaintiffs and the counterclaims for legal malpractice by the defendants. The parties other than Travelers were directed to file and serve new pleadings, setting forth their respective claims. The attorneys (and their law firms) were directed to file their claims as complaints; the Picciottos, FCC, and Nunez were directed to file answers to the plaintiffs' claims, together with any counterclaims they wished to pursue. Travelers was dismissed from the action. The court retained custody of the settlement proceeds, which were invested in interest bearing instruments.

Following extensive discovery, trial began on September 20, 2001, and lasted sixty three days.[10] On January 5, 2002, the jury returned a verdict awarding fees to the plaintiffs and rejecting the defendants' various counterclaims. Thereafter, the trial judge entered findings and rulings on the parties' claims under G. L. c. 93A, rejecting all such claims.[11] Final judgment on the various claims

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[10] Prior to trial, the judge allowed the plaintiffs' motions for summary judgment, dismissing the defendants' claims for abuse of process and civil rights violations, and dismissing the defendants' claims against the law firm of Thornton & Early. The propriety of the latter ruling is not at issue in this appeal.

[11] The judge rejected the defendants' claims outright. As to the plaintiffs' claims, the judge found that the defendant FCC had engaged in unfair and deceptive acts or practices against the plaintiffs, but concluded that an attorney may not maintain an action under G. L. c. 93A against a former client for actions arising out of the attorney-client relationship.

entered accordingly, and these appeals followed.[12] We address the parties' various claims of error in turn.

2. Jurisdiction. Before addressing the parties' substantive claims of error, we consider a matter of procedure. The defendants contend that we are without jurisdiction to consider this appeal, because no final judgment entered in the trial court. They observe that the interpleader complaint filed by Travelers named as a party Warren Five Cents Savings Bank (which had filed a lien against the settlement to secure a judgment it held against FCC), but that the judgment that entered did not resolve that claim. There is no merit to the contention. As we have explained, the initial interpleader complaint was superseded by separate complaints filed by the various plaintiffs. Warren Five Cents Savings Bank did not file a complaint and was not a party to the action as it proceeded thereafter. The judgment disposed of all claims among the parties to the resulting action and constitutes a final judgment.[13] The appeal is properly before us.[14]

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[12] During the pendency of the appeal from the judgment, the Picciottos filed several interlocutory appeals with the single justice. Melita's appeal from an order of the single justice entered on May 1, 2007, is entered on the docket of this court as no. 2007-P-842. See note 3, supra. The defendants' appeals from two other orders of the single justice, allowing motions by the plaintiffs to strike certain materials from the record appendix, were consolidated with the appeal from the judgment.

[13] Moreover, as observed by the single justice in his consideration of the issue, any claim by Warren Five Cents Savings Bank is wholly derivative (by assignment) of rights

3. Allocation of settlement proceeds among defendants. The defendants advance several separate claims of error arising from the allocation (as among the defendants) of portions of the proceeds of the Travelers settlement. Incident to the settlement with Travelers, the defendants (and Juan Nunez) entered into an agreement with each other, allocating the respective entitlement of each to the settlement proceeds (allocation agreement). The settlement agreement itself made no such allocation; it provided for payment of the lump sum of $ 9 million to Casher on behalf of the collective defendants.[15] The defendants' joint answer to Travelers's interpleader complaint made no request for a determination of the separate portions of the settlement due to each or any of them. Similarly, their answers and counterclaims filed in response to the plaintiffs' complaints requested no such determination.

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held by FCC, and as such is not essential to resolution of any competing claims of the parties to the settlement proceeds.

[14] There is likewise no merit to the separate contention that the judgment is not final because it did not determine the portions of the settlement proceeds allocable to each of the respective defendants. As discussed infra, the defendants' pleadings did not request that such an allocation be made, and the judgment is accordingly not deficient or incomplete for its failure to make one.

[15] The settlement agreement included a reference to the allocation of proceeds among the parties: it stated that "[t]he allocation of such payments among the Judgment Creditor Interests shall be disclosed if and as required by the Court." Travelers did not, however, join in the separate allocation agreement.

Prior to the commencement of trial, an attorney for Melita and Athena filed a motion seeking release of the portions of the settlement proceeds allocated to them under the allocation agreement, claiming that the failure to release such proceeds constituted a deprivation of their property in violation of their right to due process. Midway through trial, Casher sought to introduce the allocation agreement to establish the entitlement of each defendant to the settlement proceeds, and to argue that the attorneys' liens could not attach to the portions allocable to Melita and Athena (except to the extent of the relatively modest fees claimed against them).[16] [17] Late in the trial, after the trial

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[16] According to an offer of proof submitted by Casher on the thirty-seventh day of trial, the allocation agreement allotted $ 4 million to Stefano and Judith and FCC, collectively; $ 3 million to Juan Nunez (an FCC employee); $ 1.5 million to Melita; and $ 500,000 to Athena. To the extent that any claim of error rests on the contention that the attorneys' liens could not attach to the portions of the settlement proceeds allocable to Melita and Athena, it is moot. As we have noted, see note 9, supra, a total of $ 4.25 million of the $ 9 million proceeds were released before judgment entered. In any event, the aggregate fees awarded to the plaintiffs fall well short of $ 7 million (the amount at which their claims could begin to encroach on the amounts Melita and Athena claim under the allocation agreement).

[17] The defendants argue on appeal that the attorney lien statute, G. L. c. 221, § 50, limits an attorney's recovery thereunder to the share of the fund that the client has recovered. The argument is moot, for the reasons cited in the preceding footnote. In any event, the lien furnishes merely a basis to secure a claim, rather than the basis for the claim itself. With or without a lien, the attorneys were entitled to claim and recover the amounts due to them for their respective services.

judge had ruled that the allocation agreement could not be submitted in evidence, Casher sought to introduce evidence of the injuries allegedly suffered by Melita and Athena, for the purpose of establishing that their claims had value and that, accordingly, some portion of the $ 9 million settlement proceeds was allocable to their claims rather than the claims of the other defendants. Thereafter, the defendants moved to amend their pleadings "to conform to the evidence," seeking to incorporate a request to determine their separate entitlements to portions of the settlement proceeds; on appeal they claim error in the denial of that motion.

The judge did not err in rejecting the defendants' late-trial request to submit to the jury the question of their respective entitlements to the settlement proceeds. Their pleadings contained no such claim, and the judge was well within his discretion in rejecting (on grounds of tardiness) their motions to amend the pleadings, filed on the fifty-third and fifty-ninth days of the sixty-three day trial.[18] See Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 292, 361 N.E.2d 1264 (1977).

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[18] The defendants' assertions on appeal that all parties had understood from the outset of the case that the jury would be asked to determine the defendants' respective shares of the settlement proceeds stands in contrast to their repeated insistence prior to trial, and during its early stages, that the allocation of proceeds among the Picciotto parties was not a question for the jury at all, as it was determined by the allocation agreement.

There is likewise no merit to Athena's separate claim that the judge had a heightened duty to protect her interests, as she was a minor child. Whatever the judge's duties toward her may have

The judge likewise did not abuse his considerable discretion in excluding the allocation agreement from evidence. "Whether evidence is relevant is a question 'addressed to the sound discretion of the trial judge.'" Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 477, 583 N.E.2d 806 (1991), quoting from Commonwealth v. Booker, 386 Mass. 466, 469, 436 N.E.2d 160 (1982). It is "within the judge's discretion to decide whether the probative value of the evidence outweighs the possibility that it would mislead or prejudice the jury." Kobico, Inc. v. Pipe, 44 Mass. App. Ct. 103, 109, 688 N.E.2d 1004 (1997). "We will not reverse such decisions unless there is palpable error." Carrel v. National Cord & Braid Corp., 447 Mass. 431, 446, 852 N.E.2d 100 (2006).

The allocation agreement was entered into among related parties, at a time when they anticipated the attorneys' assertion of claims against Stefano, Judith, and FCC for unpaid legal fees. Moreover, the judge was aware of notes written by Casher during the course of settlement negotiations that suggested that the allocation was made in part in an attempt to "minimize exposure to attorney's fees."[19] Viewed together with evidence that the

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been, they did not extend to examining the pleadings filed on her behalf to ensure their adequacy to raise all claims she might potentially wish to assert. Moreover, as we have noted (see note 16, supra), the amounts actually awarded to the plaintiffs render moot any claim that Athena was deprived of a property interest.

[19] The judge excluded Casher's notes from evidence as attorney work product. No party challenges that ruling in this appeal.

attorneys who had been engaged to file claims on Melita's and Athena's behalf had been unable to substantiate their injuries, we consider the judge to have acted within his discretion in concluding that the allocation agreement could have tended to mislead rather than illuminate the jury as to the value of Melita's and Athena's claims and their respective shares of the settlement proceeds.

To say that the pleadings did not raise the issue of the allocation of settlement proceeds among the defendants, and that the allocation agreement was properly excluded from evidence, is not to say that the value of Melita's and Athena's claims were entirely irrelevant to the issues in the trial, however. Several of the plaintiffs sought fees in quantum meruit, arising out of terminated contingent fee agreements with Stefano and Judith, Juan Nunez, and FCC, but not with Melita and Athena.

The ability of an attorney to recover fees under a theory of quantum meruit arising out of a contingent fee agreement is settled. See Liss v. Studeny, 450 Mass. 473, 478, 879 N.E.2d 676 (2008), and cases cited. "Quantum meruit 'is a claim independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself.'" *Id.* at 479, quoting from J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 793, 494 N.E.2d 374 (1986). Strictly speaking, the termination of the attorney's engagement ends the attorney's right to recover on the contingent fee agreement itself. See Opert v. Mellios, 415 Mass. 634, 636, 614 N.E.2d 996 (1993); Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571, 575-576, 410 N.E.2d 716 (1980), *S.C.*, 384 Mass. 803, 426 N.E.2d 1160

(1981). However, "[w]hile a party does not recover on the contract itself under quantum meruit, a court may look to the terms of the underlying contract to help determine appropriate recovery under quantum meruit." Liss v. Studeny, supra at 480. "Other factors to be considered are the customary ones applicable in measuring a legal fee: the special skills which may have been brought to bear, the complexity of the case, the size of the case in terms of dollars, the caliber of the services, the fees usually charged for work of the kind involved, the time spent, and the success achieved." Salem Realty Co. v. Matera, 10 Mass. App. Ct. at 576.

From what we have said, it may be seen that the value of Melita's and Athena's claims was of some potential relevance to the determination of the fees due in quantum meruit to the plaintiffs who had been engaged under a contingent fee agreement by the defendants other than Melita and Athena. [20]

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[20] Any amount of the settlement attributable to Melita's and Athena's claims would reduce the portion of the $ 9 million in total settlement proceeds attributable to the claims of the other defendants. In other words, the attribution of no value to the daughters' claims could result in the jury accepting an artificially inflated view of the amount recovered by the other defendants (if the daughters' claims instead had substantial value). To the extent that the amount recovered by the other defendants was relevant to determination of the fees due from them under a theory of quantum meruit, the exclusion of evidence of the value of the daughters' claims could have distorted the jury's evaluation of the defendants' claims. The question accordingly is not (as the plaintiffs have framed it in their brief on appeal) whether the settlement proceeds are available on an undifferentiated basis to satisfy any amounts awarded on the plaintiffs' claims, but instead whether the jury had before them all evidence relevant to the determination of

However, its relevance was at most indirect, and related to but one of the several factors to be weighed by the jury under quantum meruit. Its proffer came late in the trial, and reflected a significant change in position by the Picciotto parties (who, as we have observed, formerly had insisted that the allocation agreement was determinative of the values of their separate portions of the settlement proceeds). If pursued, the development of the values of Melita's and Athena's claims by means of medical evidence was likely to consume significant amounts of time in relation to its relevance to the issues at trial. Cf. Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co., 381 Mass. 1, 8-9, 407 N.E.2d 319 (1980). It is not at all clear to us that the judge abused his discretion in excluding the evidence in the circumstances. [21]

Moreover, even were we to assume that exclusion of the evidence was error, we would conclude that the error was of little or no

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the result achieved by the attorneys on behalf of clients with whom they previously had contingent fee agreements.

[21] We note as well that in arguing for the admission of the evidence, Casher described Melita's and Athena's claims as claims for loss of consortium. However, no such claim had been asserted in any pleading they previously had filed, including the complaint Zabin filed in their behalf in 1994 and the proofs of claim Gilleran filed in their behalf in 1997. Nor did their answers or counterclaims in the present action (which the judge's procedural order directed be pleaded "with heightened particularity") assert any such claim. In excluding the evidence, the trial judge commented that its admission at that late stage of the trial would work an unfair surprise on the plaintiffs.

consequence to the jury's consideration of the various plaintiffs' claims, for the reasons that follow.

"If relevant evidence is erroneously excluded, the appropriate test [to determine if the exclusion created reversible error] is whether the proponent . . . has made a plausible showing that the trier of fact might have reached a different result if the evidence had been before it. Thus, the erroneous exclusion of relevant evidence is reversible error unless, on the record, the appellate court can say with substantial confidence that the error would not have made a material difference.'" Foreign Car Center, Inc. v. Salem Suede, Inc., 40 Mass. App. Ct. 15, 17, 660 N.E.2d 687 (1996), quoting from De Jesus v. Yogel, 404 Mass. 44, 48-49, 533 N.E.2d 1318 (1989). We consider the claims of each of the plaintiffs in relation to the extent to which each claim under quantum meruit could have been affected by evidence that the claims of Melita and Athena held substantial value

a. Attorney Greer. Greer's complaint sought recovery of fees for his services to Juan Nunez in the 1983 Salem Suede litigation, and to Stefano and Judith and FCC in the BayBank litigation (as to the latter, see note 9, supra). Greer did not represent Melita or Athena. Though Greer was engaged on a contingent fee basis, he based his fee claim in quantum meruit on the time he spent, rather than a percentage of the recovery. He did not keep contemporaneous time records during his representation, but testified that he had reconstructed his records to conclude that he had spent 800 hours on his representation. He also testified that his hourly rate was $ 250 per hour. The

jury awarded him $ 180,000, plus expenses, essentially accepting his request for 800 hours at $ 250 per hour. His award accordingly is unaffected by any amount of the settlement attributable to the claims of Melita and Athena. [22]

b. Attorney Eigerman. Eigerman represented Stefano, Judith, and FCC in the BayBank litigation, and represented the same parties, with the addition of Juan Nunez, in the Salem Suede litigation. He testified that Stefano and Nunez agreed to pay him at his usual hourly rate ($ 225 per hour) out of their ultimate recovery. When he withdrew from his representation, he submitted bills totaling $ 96,078.04. [2323] The jury awarded him a total of $ 93,678.56. Because his fee was based on an hourly rate and did not rest in any manner on a contingent fee arrangement, Eigerman's award is likewise unaffected by any amount of the settlement attributable to Melita's and Athena's claims.

c. Attorney McCabe. McCabe represented all of the defendants under a written fee agreement (at twice his usual hourly rate). He sought recovery of $ 137,000 from the Picciottos and $ 79,786 from Nunez. The jury awarded him $ 68,507 from the Picciottos and $ 44,630 from Nunez (appearing, in

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[22] The jury verdict does not appear to award Greer any amount for his representation of Nunez in the Salem Suede litigation. He testified that he and Zabin agreed that they would share the fee earned by Zabin in that case. In his closing, Zabin's attorney stated that Zabin would pay Greer from the amount awarded to Zabin.

[23] He did not submit periodic bills during the course of his representation, because his arrangement did not contemplate payment until his clients achieved a recovery.

essence, to reject his request for compensation at twice his usual hourly rate). Because his fee was based on an hourly rate rather than a contingent fee, and because he represented all of the defendants, including Melita and Athena, his award is unaffected by any amount of the settlement proceeds attributable to the daughters' claims.

d. Attorney Zabin. Zabin represented Melita and Athena only briefly, and withdrew from that representation upon his inability to satisfy himself that they had any grounds for a claim. Zabin represented the other defendants under a contingent fee arrangement calling for forty percent of the recovery. At trial, Zabin's expert, attorney Camille Sarrouf, testified that Zabin was entitled to receive forty percent of $ 2.2 million (the highest offer he received in settlement negotiations), plus expenses. That settlement offer did not encompass Melita's and Athena's claims, and cannot be said to include any amount attributable to them. The expert further testified that Zabin's success was the foundation of the ultimate settlement, and that his efforts following completion of the Salem Suede trial contributed to the ultimate result. In his summation, Zabin's attorney argued to the jury that they should award him forty percent of $ 2.2 million, plus "an award that you feel is fair and reasonable for the work he did" for the three years after the trial that contributed to the ultimate settlement. The jury awarded Zabin $ 1,010,000, plus expenses. Accordingly, to the extent the jury awarded Zabin any amount deriving from the amount by which the ultimate $ 9 million settlement exceeded the $ 2.2 million offer he received, the basis upon which any additional amount rested was insubstantial in

relation to the full settlement amount. [24] We conclude that the jury did not base their award to Zabin on an artificially inflated view of the amount of the recovery attributable to his clients' claims.

c. Attorney Gilleran. Gilleran represented Nunez, Stefano and Judith, and FCC under a contingent fee agreement, and represented Melita and Athena on an hourly rate basis. He sought a contingent fee based on the entire $ 9 million settlement, plus an hourly fee for his services on behalf of Melita and Athena. At trial, Gilleran's expert gave his opinion regarding the proper methodology for determining the fee due to Gilleran in quantum meruit, and Gilleran's trial attorney reminded the jury of that methodology, in detail, in his brief closing argument. According to the expert, the jury should begin with the full settlement amount ($ 9 million), deduct the value of the judgment (with interest) as of the time Gilleran commenced his engagement ($ 2,327,249), and multiply the resulting figure by thirty-five percent (the contingent fee percentage established under Gilleran's contingent fee agreement). From the resulting $ 2,334,762, the jury should then subtract the amounts awarded to McCabe and Eigerman, and the amount paid to Casher ($ 231,000). [25] The result

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[24] The amount of the jury award ($ 1,010,000) is forty percent of $ 2,525,000. Accordingly, the jury appears to have attributed to Zabin's posttrial efforts only $ 325,000 of the $ 6.8 million by which the ultimate settlement exceeded the highest offer Zabin had obtained.

[25] Under the suggested formula, Zabin's fee was to be recovered from the underlying award in the Salem

of that calculation produced a fee for Gilleran in the amount of $ 1,858,809, according to the expert. That amount, however, far exceeds $ 1,052,000, the amount the jury actually awarded to Gilleran. More significantly, the amount of the jury's actual award to Gilleran is lower than the amount the jury would have awarded Gilleran, pursuant to the same formula, had it excluded $ 2 million (the amount claimed by Melita and Athena under the allocation agreement) from the $ 9 million settlement proceeds. Viewing the evidence as a whole, we are not persuaded that the trier of fact might have reached a different result as to Gilleran had the evidence been admitted. See De Jesus v. Yogel, 404 Mass. at 47-49.

4. Prejudgment interest. Upon entry of the judgment, the trial judge awarded the plaintiffs statutory interest under G. L. c. 231, § 6C, commencing as of April 7, 1999, the date on which Travelers filed its interpleader complaint. On appeal, the defendants contend that no prejudgment interest should have been awarded. [26]

Payment of interest on an award for breach of contract is governed by G. L. c. 231, § 6C. As we have

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Suede litigation. Greer's fee for his involvement in the Salem Suede litigation was to come out of Zabin's share. See note 22, supra.

[26] The defendants' separate contention that postjudgment interest should not have accrued, because no final judgment entered, is disposed of by our conclusion, supra, that final judgment did enter.

discussed, the claims of the plaintiffs sound in contract, though the determination of their entitlements was based on principles of quantum meruit. The applicability of the statute to claims for attorney's fees based in quantum meruit is established. See Abrams v. Loew, 335 Mass. 96, 100, 138 N.E.2d 590 (1956); Salem Realty Co. v. Matera, 10 Mass. App. Ct. at 577-578. Pursuant to the statute, interest runs from the date of breach or demand. In a case (such as the present case) in which the date of breach or demand is not determined by the jury, the statute provides that interest shall run from the date on which suit is commenced.[27] See Deerskin Trading Post, Inc. v. Spencer Press, *Inc.*, 398 Mass. 118, 125, 495 N.E.2d 303 (1986).

The defendants contend that interest should not run in the present case because it initiated as an interpleader action, rather than as a conventional action for breach of contract. The argument is misplaced for several reasons. First, the deposit of funds into court typically relieves only the depositor from the accrual of interest after such deposit, and then typically only where the depositor disclaims all

[27] The defendants' reliance on Craft v. Kane, 65 Mass. App. Ct. 322, 839 N.E.2d 854 (2005), for the contrary proposition is unavailing. In that case, which presented "a unique set of circumstances," *id.* at 327, an attorney sought to enforce a lien for payment of services by means of a motion brought in the underlying suit, rather than (as in the present case) by an action for breach of contract. *Id.* at 333. In any event, to the extent that Craft may be read to suggest that interest cannot run on a claim under quantum meruit until the value of the services is determined, it is inconsistent with Salem Realty Co., supra and Abrams, supra and we decline to follow the suggestion.

further right to the deposited funds. See Tarpey v. Crescent Ridge Dairy, Inc., 47 Mass. App. Ct. 380, 393, 713 N.E.2d 975 (1999). More fundamentally, the trial judge dismissed Travelers at a very early stage of the proceedings, and thereafter, pursuant to the judge's procedural order of realignment of the parties, the case was repleaded as an action by the plaintiffs for breach of contract (and related claims), with counterclaims filed by the defendants with their answers. The amended pleadings superseded the initial interpleader complaint in form and in substance. Thereafter, the funds held by the court stood as security for the plaintiffs' claims and were released by the judge at various intervals upon a showing that the amount to be released was unnecessary as security for the amounts claimed.[28]

The defendants' argument that interest should not run because they did not have use of the funds during the pendency of the proceedings is inapposite. The award of interest compensates the prevailing party for the loss of use of funds, without regard to any use made by the adverse party (or whether funds were held in escrow). See Conway v. Electro Switch Corp., 402 Mass. 385, 390, 523 N.E.2d 255 (1988); Smith v. Consalvo, 37 Mass. App. Ct. 192, 194 n.3,

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[28] Had the plaintiffs initiated suit on their claims by means of a complaint for breach of contract, and sought prejudgment security by means of attachment or a bill to reach and apply, there is no question that they would be entitled to interest on any award beginning on the date of their complaint. See DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 107, 449 N.E.2d 1189 (1983). We see no reason why a different result should obtain merely because Travelers precipitated the present action by its complaint for interpleader.

199, 638 N.E.2d 501 (1994). In any event, though the defendants did not have actual use of the funds while they were on deposit with the court, the funds were invested in interest-bearing instruments, and the earned interest operated to defray (at least to some extent) the accrual of interest under G. L. c. 231, § 6C. [29]

5. Deposition of Attorney Casher. The defendants contend that the trial judge erred in allowing the plaintiffs to take the deposition of Casher, the defendants' trial counsel, and that the error was compounded by allowing the deposition to be introduced in evidence at trial. We disagree.

Central to the issues in dispute in the present case were (1) what services each plaintiff furnished on behalf of the defendants during the period of engagement, (2) how those services contributed to the settlement with Travelers, and (3) whether any of the plaintiffs committed malpractice in the course of providing those services. Among other allegations, the defendants contended that the plaintiffs contributed little toward the achievement of the Travelers settlement, and that the settlement accordingly was attributable largely to the services Casher furnished following termination of the plaintiffs' respective engagements. Though the parties have cited no Massachusetts precedent directly on point, we agree with the cases from other jurisdictions relied upon by the trial judge holding that in cases (such as the present case) in which a

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[29] It is of no consequence for purposes of the statute that the rate of interest imposed under G. L. c. 231, § 6C, was higher than the rate actually earned by the funds in conventional investment instruments.

client sues a former attorney for malpractice, the attorney-client privilege is waived as to communications with all attorneys involved in the underlying litigation in which the malpractice allegedly occurred. See Rutgard v. Haynes, 185 F.R.D. 596, 597-600 (S.D. Cal. 1999); *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 176-179 (D. Minn. 1994); Pappas v. Holloway, 114 Wash. 2d 198, 202-209, 787 P.2d 30 (1990). See also Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); Hearn v. Rhay, 68 F.R.D. 574, 580-582 (E.D. Wash. 1975). The nature of the defendants' allegations placed the work Casher performed in the underlying litigation directly at issue, and Casher was the only source available to testify regarding the work she performed. The trial judge imposed an appropriate protective order on the scope of the deposition, directing that it could not extend to any communications between Casher (or her law firm) and the defendants relating to the preparation and conduct of the present case. There was no error in the denial of Casher's motion to quash the deposition subpoena.

Prior to trial, the judge allowed the motion of the plaintiffs to offer in evidence portions of the transcript of Casher's deposition testimony. We review the decision of a trial judge to allow use of a deposition at trial for abuse of discretion. See, e.g., Allgeier v. United States, 909 F.2d 869, 876 (6th Cir. 1990) (interpreting standard of review under identical Federal rule). We discern no abuse of discretion in the present case, if for no other reason than that (as observed by the trial judge) use of the deposition avoided the undesirable result of

requiring Casher to testify at a jury trial in which she also appeared as an advocate.

There is no merit to the defendants' protest that Casher was not represented by counsel at her deposition. The judge's order denying her motion to quash the deposition specifically directed that she should be represented by counsel, and the choice (whether by the defendants or Casher herself) to eschew such representation cannot be cause for them to object to the resulting deposition (or its use). There is similarly no basis for objection in the fact that Casher was not subject to cross-examination at her deposition. To the extent the absence of cross-examination was a result of the absence of an attorney representing her at the deposition, it was, as we have noted, the result of choice. Moreover, had the defendants wished to supplement the deposition with cross-examination for purposes of its use at trial, they could have sought leave to resume the deposition upon entry of the judge's pretrial order authorizing use of the deposition at trial. [30] The record reveals no such request. [31] Finally, the Picciottos were allowed to offer, as rebuttal, other portions of Casher's deposition transcript in evidence.

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[30] The judge's written order is dated August 2, 2001; trial began on September 20, 2001.

[31] The solution the defendants proposed during trial (to have Melita conduct a pro se cross-examination of Casher through live testimony at trial) would, among other infirmities, have created the very situation (trial counsel acting as both advocate and witness before the jury) that the use of the transcript was designed to avoid. The judge committed no abuse of discretion in denying that tactic.

6. Dismissal of claims based on Stefano's medical records. During discovery, the plaintiffs learned that Stefano had applied for, and obtained, disability benefits from the Social Security Administration based on the adverse health effects he suffered as a result of the Salem Suede emissions. Counsel for one of the plaintiffs requested that Stefano execute a consent form for the release of the medical records submitted in support of that application. Stefano's counsel responded that the records were "not relevant," and the plaintiffs sought, and obtained, an order directing the Social Security Administration to produce the records. After the Social Security Administration refused to produce the records without Stefano's consent, the plaintiffs sought, and obtained, an order directing Stefano to execute such a consent within thirty days.[32] [32] Stefano's interlocutory appeal from that discovery order was unsuccessful, but he nonetheless refused to comply with it. Following a hearing at which Stefano was given one last opportunity to comply with the order, the judge dismissed Stefano's counterclaims for emotional distress, and barred him from asserting claims relative to his physical and mental injuries. On Melita's subsequent request for clarification, the judge thereafter ruled that the other Picciotto family members could not assert claims for loss of consortium based on the injuries to Stefano.

The judge was clearly within his discretion in ordering Stefano to consent to the release of the

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[32] The order advised that, unless Stefano complied with the order, certain of his counterclaims would be dismissed.

requested documents. Discovery is permitted as to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Cronin v. Strayer, 392 Mass. 525, 534, 467 N.E.2d 143 (1984), quoting from Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978). The records were clearly relevant to Stefano's condition and reasonably could be expected to include the evaluation of his condition by independent medical professionals within the Social Security Administration. Stefano was given fair warning of the consequences that would follow his continued defiance of the judge's order, and the judge acted within his discretion in imposing the threatened sanction.[33] See Roxse Homes Ltd. Partnership v.

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[33] The defendants contend that the sanction of dismissal was extreme and unwarranted, asserting that they offered to produce all documents other than those relating to payments of public assistance. To the contrary, the judge specifically noted in his order of dismissal that he had, on February 2, 2001, requested Stefano's counsel "to identify those documents or categories of documents which he did not want disclosed by the Social Security Administration [but that] [n]either Stefano nor his counsel specified documents or categories of documents entitled to special protection." Again, in rejecting Melita's emergency motion for reconsideration, the judge specifically noted that "at no time during the pendency of the effort of the lienholder attorneys . . . to achieve production of Mr. Picciotto's Social Security records did he offer to provide those health or medical records upon condition of the protection of his Social Security Welfare benefit records. Stefano offered no compromise solution and simply refused to obey the pertinent court orders." No contemporaneous challenge to those statements appears in the record. Casher's affidavit asserting otherwise, filed more than four months following the return of the adverse jury verdict and more than a year after the judge's order, is without corroboration in the record.

Roxse Homes, Inc., 399 Mass. 401, 404-406, 504 N.E.2d 633 (1987).

Nor do we discern any prejudice in the imposition of the sanction on the other Picciotto family members. To the extent any such evidence was potentially relevant to establish the separate values of Melita's and Athena's claims, it worked no prejudice for the reasons described in our discussion of the allocation agreement above. In any event, as we have observed (see note 21, supra), neither daughter ever asserted any claim for loss of consortium in any pleading in any proceeding (including the present action). As for Judith, her claims against the plaintiffs sought damages for intentional infliction of emotional distress and similarly did not assert any claim that their actions caused loss of consortium based on injuries suffered by Stefano.

7. Evidentiary rulings. The defendants claim error in several rulings by the trial judge to exclude evidence, which we address below.

a. Evidence of defendants' own efforts toward settlement. The defendants sought to introduce evidence of efforts they made to prompt Travelers to settle with them, for the purpose of demonstrating that the efforts of the plaintiffs were not as instrumental to producing the settlement as the plaintiffs claimed. In particular, the defendants cite a petition Melita filed with the Supreme Judicial Court in December, 1998, seeking review of

Travelers's license to issue insurance based upon its allegedly improper conduct. Noting the close temporal proximity between the filing of the petition and the settlement with Travelers in January, 1999, the defendants sought to introduce the petition to support the contention that it contributed to Travelers's agreement to settle with them. We discern no abuse of discretion in the trial judge's ruling that absent supporting testimony by Travelers, any inference that Melita's petition contributed to the settlement is speculative.[34]

b. Letter of January 7, 1998, from Judith to Gilleran. Early in the trial, the judge issued an order in response to several attempts by the defendants to submit in evidence letters containing hearsay, arguments, conclusions, and accusations. In his order, the judge observed that such letters typically included a great deal of inadmissible material accompanying any admissible material, and he directed counsel to redact inadmissible portions of such letters before offering them in evidence. During cross-examination of Gilleran, the judge excluded a letter from Judith to Gilleran dated January 7, 1999. There is no indication in the record that counsel

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[34] The defendants also assert that, through their own independent efforts, they discovered damaging internal Travelers's loss manuals which contributed to Travelers's decision to settle. Similarly, they assert that they uncovered evidence of fraud in Salem Suede's bankruptcy proceeding. In both cases, they claim, the judge improperly excluded the evidence. However, they have furnished no citation to any such order or ruling, or to any offer of proof, in the record. Without support in the record, they cannot establish error or prejudice.

complied with the judge's earlier order to redact inadmissible material before offering the letter in evidence. For that reason alone the exclusion of the letter was justified.[35] Moreover, the judge allowed the defendants' counsel to cross-examine Gilleran regarding the contents of the letter.

c. Evidence of attorney's fee demands between the Travelers settlement and interpleader complaint. The trial judge sustained objections to the defendants' attempts to elicit, from Zabin, testimony concerning his efforts to secure payment of his fee (by filing liens in the Bankruptcy Court and opposing, in Superior Court filings, distributions of proceeds by the court to the defendants). The defendants contend the judge's ruling was error, as the evidence was relevant to their claims of negligence by the plaintiffs and of the plaintiffs' unfair and deceptive practices, and in defense of the plaintiffs' claims of unfair trade practices against them. There was no error.

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[35] The letter contained numerous assertions by Judith that Gilleran's performance was substandard, and it was offered for the purpose of establishing that proposition (in order to establish that Gilleran did not have good cause to withdraw as counsel). The unredacted hearsay was inadmissible, as it would have "permitted [Judith] to corroborate [her] own testimony and bolster [her] own credibility." Commonwealth v. Mazzone, 55 Mass. App. Ct. 345, 348, 770 N.E.2d 547 (2002), quoting from Commonwealth v. Quincy Q., 434 Mass. 859, 869, 753 N.E.2d 781 (2001).

Zabin's attempts to secure payment of his fee (following conclusion of his engagement) is wholly separate and distinct from the question of his negligence or proficiency in the representation from which the fees derived, and is irrelevant to the defendants' claims of malpractice. Moreover, under G. L. c. 221, § 50, an attorney's lien attaches to the full amount of a settlement or judgment, until determination of the amount due to the attorney. The defendants cite no authority for their contention that Zabin's efforts to secure payment of his fee constitutes an unfair or deceptive act or practice.

The defendants cite no other instance in the record in which the judge excluded evidence of the plaintiffs' pretrial demands for payment. Though Casher asserted in an affidavit filed several months following the jury's verdict (see note 33, supra) that, if allowed, she would have offered deposition testimony, answers to interrogatories, and other documents to support the defendants' claim that the plaintiffs made unreasonable demands, the defendants have furnished no citation to the record (and our review of the record has revealed no instance) showing any attempt to offer any such materials in evidence, any offer of proof, or any orders or rulings excluding them. [36]

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[36] During her opening statement, Casher asserted that the plaintiffs had sought fees which, in aggregate, exceeded the full $ 9 million settlement proceeds. Upon objection by the plaintiffs, the judge administered an instruction to the jury that based on the pleadings filed with the court, the plaintiffs were not seeking the full $ 9 million proceeds, and further informed the jury that $ 3 million had (to that point) been released to the defendants. The judge further instructed the jury to keep an open mind about how much the plaintiffs evidence presented at

d. Expert testimony of Herbert Weissblum. In their brief, the defendants Stefano and Judith assert that the trial judge erred in precluding one of their expert witnesses, attorney Herbert Weissblum, from "offering opinions as to the actions taken by attorney Zabin." They do not specify any ruling in particular to which their claim of error relates.[37] Furthermore, Weissblum testified at length on a variety of subjects at trial. The defendants have made no showing of error.[38]

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trial on that issue. The judge expressly stated to Casher that his ruling on the plaintiffs' objection to her opening statement did not preclude her from introducing evidence at trial to show that the aggregate amount of the plaintiffs' claims could exceed $ 9 million, and based on such evidence, to return to such an argument later in the trial.

[37] The record citation accompanying the argument is to the affidavit (with exhibits) of Stefano in support of the defendants' motion for correction or modification of the record. The affidavit and exhibits encompass 255 pages, and cover a variety of subjects. One of the exhibits to the affidavit is an affidavit of Weissblum, apparently filed in support of the opposition to a motion in limine filed by the plaintiffs. In it, Weissblum expresses his opinion that Zabin's agreement to the dismissal of the defendants' claims against Salem Suede under G. L. c. 93A was negligent and caused substantial harm to his clients. We assume that Weissblum's affidavit is the reference intended by the record citation. However, though the affidavit describes a portion of the testimony Weissblum proposed to furnish, that description does not correspond to the description of the testimony Stefano's brief describes as having been excluded. Moreover, Weissblum was allowed to testify at trial regarding the subjects described in his affidavit.

[38] We note that, in a lengthy written order on the plaintiffs' motion in limine, the judge barred testimony of the defendants' experts as to certain subjects, based on inadequate responses to expert interrogatories. Though the plaintiffs' motion was denied

c. Testimony of Zabin. The judge denied the plaintiffs' motion in limine insofar as it sought to preclude Weissblum from testifying that Zabin was negligent in agreeing to the dismissal of the defendants' claims against Salem Suede under G. L. c. 93A, based on his conclusion that there was legal support for the expert's opinion. Based on that ruling, the defendants contend that it was error for the judge to allow Zabin to offer, through his own testimony, his contrary opinion that the defendants' claims against Salem Suede under c. 93A were without merit (and, therefore, that he was justified in agreeing to the dismissal of such claims). The defendants' contention is unavailing. In his ruling on the motion in limine, the judge expressed his view that the question was close. In an action for malpractice, the law does not require an attorney to be perfect or infallible in assessing the likelihood of success for a particular claim. See Coastal Orthopaedic Inst., P.C. v. Bongiorno, 61 Mass. App. Ct. 55, 58-59, 807 N.E.2d 187 (2004). "As a predicate to rendering such litigation opinions, the legal engagement by the attorney involves the undertaking of a comprehensive review of the case facts and an analysis of applicable law, in which endeavors the attorney must 'act[] with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge.'" Ibid., quoting from

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as to most of the subjects to be covered by Weissblum's anticipated testimony, it was allowed in certain respects. However, on appeal the defendants merely argue that the limitation of Weissblum's testimony caused them prejudice. They do not contend that his answers to interrogatories on the excluded subjects were in fact adequate or that the judge's ruling was incorrect.

Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., 25 Mass. App. Ct. 107, 111, 515 N.E.2d 891 (1987). Even if his assessment was ultimately incorrect, which we need not decide, Zabin's thought process at the time of his advice was relevant and material to the negligence claim against him, as were the grounds for his conclusion. Moreover, his testimony was subject to cross examination. There was no error.

8. Due process. The defendants claim a number of errors that they contend deprived them of due process. Upon close examination of the record, we conclude that the claimed errors, viewed individually or collectively, do not require a new trial.

a. The defendants claim that the absence from the court room of an American flag, required by G. L. c. 220, § 1, warranted a mistrial. Our review of the transcript reveals that counsel made no objection to proceeding without the presence of an American flag.[39] When the issue was raised by Melita at the

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[39] We note that, in a lengthy written order on the plaintiffs' motion in limine, the judge barred testimony of the defendants' experts as to certain subjects, based on inadequate responses to expert interrogatories. Though the plaintiffs' motion was denied as to most of the subjects to be covered by Weissblum's anticipated testimony, it was allowed in certain respects. However, on appeal the defendants merely argue that the limitation of Weissblum's testimony caused them prejudice. They do not contend that his answers to interrogatories on the excluded subjects were in fact adequate or that the judge's ruling was incorrect.

outset of her testimony, the record indicates that the flag had been borrowed by another court, and was returned to the courtroom before the morning session was over. Moreover, there is no suggestion in c. 220, § 1, that the absence of an American flag from the court room requires a new trial. [40]

b. Melita claims that the judge's denial of her pretrial request to proceed pro se forced her to receive the assistance of ineffective counsel. [41] We recognize that "[a]s a general proposition, individuals may prosecute or defend their own action. G. L. c. 221, § 48." LoCicero v. Hartford Ins. Group, 25 Mass. App. Ct. 339, 344, 518 N.E.2d 530 (1988). "When litigation is actively before the court, however, the grant or denial of a lawyer's motion to withdraw in a civil case reposes in the discretion of the motion judge." Ibid. Judges may consider the timeliness of the motion, the effect upon the reasonable expectation of the opposing party to have a case efficiently adjudicated, and the imposition on the court. Ibid.

In denying Melita's request, the judge observed that Casher had been serving as Melita's counsel since commencement of the action, was well familiar with its intricacies, and would continue to serve as counsel to the other defendants. In addition, Melita had engaged in disruptive behavior during a number

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[40] The defendants cite no prejudice flowing from the claimed error.

[41] We note that nothing in the judge's order precluded Melita from engaging other counsel.

of pretrial proceedings, including pacing back and forth within the bar enclosure; delivering prolonged monologues; shouting; refusing instruction to sit down, stop talking, and allow the proceedings to continue; and directing offensive personal remarks toward other parties and the judge. The judge at one point issued an order forbidding Melita from engaging in further misconduct and instructing her that further disruptions would have adverse consequences, including a finding of contempt and imposition of contempt sanctions. The disruptive potential of such behavior was magnified in the circumstances of this case, which involved multiple parties and issues, and which clearly would require an extended trial even in the hands of experienced counsel for all parties. We discern no abuse of discretion in the judge's refusal to allow Melita to proceed pro se.

c. Citing Supreme Judicial Court Rule 1:19 (2000), the defendants claim it was error to deny their motion to allow them to videotape the proceedings. To the contrary, though rule 1:19 permits electronic recordings of proceedings open to the public by the news media for news gathering purposes and dissemination, it does not require judges to allow parties to videotape proceedings. The defendants make no reasoned legal argument that their request falls within the purview of rule 1:19, or that some other legal rationale demonstrates that the judge abused his discretion by denying their request for a videographer.

d. The defendants contend that the judge met, outside the court room, with a partner of one of the attorneys representing the plaintiffs, for the purpose

of discussing the possibility of the judge becoming a trustee of the board of alumni at the law school from which both had graduated. There is no allegation that the instant litigation was mentioned during the meeting. Even accepting the allegation as true, there is no suggestion in the record that the judge pursued the possibility, or that any feature of the encounter raises a question of the judge's impartiality. See Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 551-552, 703 N.E.2d 1141 (1998). We discern no due process violation.

e. As the trial approached the end of October, the jurors asked the judge if he would allow them to wear costumes on Halloween. After consulting with counsel for all parties and hearing no objection, the judge allowed the request. The defendants contend that the presence of jurors in costumes turned the trial into a circus and denied their rights to due process. [42]

With or without the consent of counsel to the parties, it is regrettable that the trial judge agreed to the jurors' request. The introduction of Halloween costumes cannot but have detracted from the seriousness and gravity of formal court proceedings.

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[42] The defendants also assert that some of the plaintiffs' counsel handed out candy to the jurors. They further claim that, on another occasion, a proposed "cast list" was circulated for a Hollywood movie version of the trial. The record reveals no objection to counsel to any party handing out candy to the jurors or any indication that the "cast list" was circulated to the jury.

However, as to the defendants' claim of a due process violation, the judge did not merely accommodate the jurors' request; he consulted with counsel for all parties before doing so, and all counsel agreed. The issue is waived.

f. Finally, the defendants argue that a new trial is required because the judge spoke to the press about the case while this appeal was pending, in violation of the Massachusetts Code of Judicial Conduct, S.J.C. Rule 3:09. The newspaper report evidencing this alleged violation properly was struck from the record. In addition to its status as hear-say, the judge's conduct after the termination of the trial is irrelevant to any claim of error in the conduct of the trial itself, or to any of the issues on appeal.

9. Dismissal of counterclaims against Attorney Greer. The defendants claim error in the dismissal of their counterclaims against Greer for abuse of process and violation of G. L. c. 93A. Both claims, they contend, are supported by his improper assertion of a lien against the settlement proceeds to secure his claim for fees. The defendants maintain that because his representation was limited to the BayBank litigation, his lien against the Travelers settlement proceeds was improper.

The argument is flawed on at least two levels. First, Greer entered an appearance in the 1983 Salem Suede litigation on behalf of Nunez, and had a fee agreement with Zabin for a percentage of Nunez's recovery. Moreover, the Travelers settlement encompassed all claims against Alan Zion (see notes 8, 9, supra). Zion was a party defendant in the BayBank litigation, and the appeal of the judgment

in that case was pending at the time of the Travelers settlement. [43]

The defendants also argue that the fee awarded to Greer should be vacated, because his representation of them in the BayBank litigation was under a contingent fee agreement and the contingency did not occur. See Liss v. Studeny, 450 Mass. at 481 "As a general rule, the court will not grant quantum meruit recovery arising from a contingent fee contract where the contingency has not occurred"). [44]

In Liss, the court recognized that exceptions to the general rule may be appropriate in certain "particularly compelling situations." Ibid. For example, quantum meruit may be appropriate where the claimant's reasonable expectations are defeated by the actions or conduct of the party against whom a fee is claimed. Ibid., citing Salamon v. Terra, 394 Mass. 857, 859, 477 N.E.2d 1029 (1985). See Girouard v. Jasper, 219 Mass. 318, 321, 106 N.E. 849 (1914) (contractor induced by fraud may recover for value of labor and materials).

In the present case, Greer testified that Stefano told him that a "confidential informant" had observed Alan Zion influencing BayBank to "make things difficult" for Stefano at BayBank. Relying on that representation, Greer agreed to represent FCC and

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[43] The judgment was affirmed on March 25, 1999. See *Picciotto v. BayBank*, 46 Mass. App. Ct. 1119, 708 N.E.2d 153 (1999).

[44] Liss v. Studeny, supra was decided after briefing concluded in the present case, and neither party has addressed it in their otherwise voluminous post briefing submissions.

Stefano and Judith on a contingent fee basis, and he filed an action against BayBank and Zion, alleging that they had engaged in a conspiracy. [45]

On conflicting evidence, the jury concluded that Stefano had misled Greer about the strength of his claims against BayBank and Zion in order to induce Greer to undertake representation of him on a contingent fee basis. That conclusion justifies the jury's award of damages in quantum meruit, and it is not our province to disturb the jury's conclusion in such circumstances. See Coady v. Wellfleet Marine Corp., 62 Mass. App. Ct. 237, 247-248, 816 N.E.2d 124 (2004).

10. Claims under G. L. c. 93A Having reserved the parties' respective claims under G. L. c. 93A, the trial judge entered findings of fact and rulings of law, ultimately concluding that no party was entitled to recover under c. 93A. As to the defendants' claims against the plaintiffs, the judge found that the plaintiffs' actions did not constitute unfair or deceptive acts or practices. [46] As to the plaintiffs'

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[45] During the course of his representation, Greer sought and obtained an injunction against BayBank's threatened foreclosure of the Picciottos' residence (which had been mortgaged as collateral to secure a loan to FCC). As a result, the foreclosure of the Picciottos' home was delayed from approximately the time of Greer's engagement in 1994 through the appeal of the judgment in the BayBank litigation. Ultimately, proceeds from the Travelers settlement were released and applied to satisfy the BayBank claim and avoid foreclosure. See note 9, supra.

[46] Other than their challenges to certain evidentiary rulings with potential bearing on their c. 93A claims, discussed supra, the defendants assert no challenge on appeal to the judge's rulings on their c. 93A claims themselves.

claims against FCC, the judge found that FCC had engaged in unfair and deceptive acts or practices, but that an attorney cannot recover against a former client under c. 93A for actions arising out of the former attorney-client relationship. Eigerman has appealed from the latter ruling, as to his claim. [47] We affirm the dismissal of Eigerman's claim, though we do so on grounds other than those relied upon by the trial judge.

Eigerman asserted his claim against FCC under G. L. c. 93A, §§ 2 and 11, based on its failure to pay him for legal services rendered to it. [48] A breach of contract, standing alone, is not an unfair trade practice under c. 93A. See Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-101, 390 N.E.2d 243 (1979). Instead, to rise to the level of a c. 93A violation, a breach must be both knowing and intended to secure "unbargained-for benefits" to the detriment of the other party. NASCO, Inc. v. Public Storage, Inc., 29 F.3d 28, 34 (1st Cir. 1994). The breaching party's conduct must exceed the level of mere self-interest, see Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 225-226, 598 N.E.2d 666 (1992),

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[47] The other plaintiffs assert no challenge to the ruling.

[48] In his memorandum of decision, the trial judge did not address whether Eigerman and FCC were engaged in trade or commerce, for purposes of G. L. c. 93A, § 11. For purposes of our analysis, we assume, without deciding, that the parties were engaged in trade or commerce, based on Eigerman's efforts on FCC's behalf to recover a money judgment owed to FCC and arising out of damages suffered, inter alia, for loss of business. See *Frullo v. Landenberger*, 61 Mass. App. Ct. 814, 821-822, 814 N.E.2d 1105 (2004).

rising instead "to the level of 'commercial extortion' or a similar degree of culpable conduct." Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd., 217 F.3d 33, 40 (1st Cir. 2000), cert. denied, 531 U.S. 1146, 121 S. Ct. 1084, 148 L. Ed. 2d 959 (2001), quoting from Anthony's Pier Four, Inc., v. HBC Assoc., 411 Mass. at 474.

Specifically, a party's refusal to make payments due under a contract does not constitute an unfair trade practice where the party, in good faith, disputes its obligation to make the payments. Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504, 396 N.E.2d 149 (1979). See Striar v. American Med. Intl., Inc., 45 Mass. App. Ct. 87, 100-101, 695 N.E.2d 1079 (1998) (failure to make payments not an unfair trade practice where breaching parties had genuine and substantial difference of opinion as to amounts due under contract); Quaker State Oil Refining Corp. v. Garrity Oil Co., 884 F.2d 1510, 1513-1514 (1st Cir. 1989) (failure to make payments and filing counterclaims not unfair trade practices where there was no indication that breaching party's actions were motivated by attempt to extort other party). Only when the breaching party uses its failure to make payments as a wedge against the other party to gain advantages does the breaching party's conduct rise to the level of an unfair trade practice under G. L. c. 93A. See Community Builders, Inc. v. Indian Motocyle Assocs., Inc., 44 Mass. App. Ct. 537, 558-559, 692 N.E.2d 964 (1998) (failure to make payments was an unfair trade practice where breaching parties withheld payment to pressure the other party to compromise its claims for payment); Pepsi-Cola Metropolitan Bottling Co. v. Checkers,

Inc., 754 F.2d 10, 18 (1st Cir. 1985) (failure to make payments was an unfair trade practice where breaching party withheld payment to enhance its bargaining power with the other party); Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 55-56 (1st Cir. 1998) (failure to make payments was an unfair trade practice where breaching party withheld payment to force the other party to accept discounted settlement of its claims for payment).

Whether conduct is unfair or deceptive under G. L. c. 93A is a mixed question of law and fact. However, unlike some such questions, the fact can be separated from the law, and each subjected to a different standard of review. See Schwanbeck v. Federal-Mogul Corp., 31 Mass. App. Ct. 390, 414, 578 N.E.2d 789 (1991), *S.C.*, 412 Mass. 703, 592 N.E.2d 1289 (1992) ("Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, . . . the boundaries of what may qualify for consideration as a c. 93A violation is a question of law"). Thus, when reviewing a trial judge's conclusion that particular conduct was or was not unfair or deceptive, we review the judge's subsidiary findings of fact under the clearly erroneous standard, while reviewing de novo his ultimate conclusion of law. See Diamond Crystal Brands, Inc. v. Backleaf, LLC, 60 Mass. App. Ct. 502, 507-508, 803 N.E.2d 744 (2004). See also *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 435 Mass. 66, 73, 754 N.E.2d 668 (2001).

In the present case, Eigerman did not have a written fee agreement. The trial judge found that FCC (together with Stefano and Judith) formed the understanding with Eigerman that the clients lacked

the funds to pay Eigerman at the time of their engagement of him, but that they would compensate him for the fair value of his services from the collection of damages from one or more of Zion, Salem Suede, or Travelers. The trial judge further found that FCC's refusal to pay Eigerman after the settlement with Travelers constituted an unreasonable and unfair tactic, and that its prosecution of a malpractice claim against him was unreasonable and unfair conduct. We consider the trial judge's conclusions that FCC's failure to pay, and its prosecution of a malpractice claim against Eigerman, constituted an unfair trade practice to be erroneous as matter of law.

The settlement agreement between the Picciottos (including FCC) and Travelers expressly conditioned the release of the settlement proceeds upon the resolution of any liens or claims against the proceeds. As a strictly technical matter, FCC did not obtain control of the settlement proceeds upon the conclusion of the settlement agreement with Travelers, so its failure to pay upon settlement cannot even be said to have been in breach of its agreement with Eigerman (which contemplated payment only upon receipt of funds). Nor can it fairly be said that FCC's lack of receipt was a problem of its own making; as we have discussed above, several of the plaintiffs sought fees in quantum meruit, based on terminated contingent fee agreements. The determination of the fees due in such circumstances is highly fact specific, based on a particularized weighing of multiple factors in an adjudication. Whether Eigerman's particular claim (based on his hourly rate) was susceptible of more straightforward determination is beside the point; unless and until

the competing claims of the various attorney lienholders were determined, FCC did not have access to the settlement proceeds. Pending final judgment in the present litigation, FCC was not in breach of its arrangement with Eigerman, much less guilty of unfair or deceptive acts or practices by reason of its failure to pay him.

The judge's subsidiary findings of fact similarly furnish no support for a conclusion that the assertion of a malpractice claim against Eigerman constituted an unfair or deceptive practice; the mere fact that the claim was unsuccessful does not mean that it was unfair or deceptive. The judge entered no finding that the claim was frivolous or prosecuted in bad faith. [49]

11. Other issues. We address briefly several claims by the defendants relating to the record and other actions by the single justice.

a. Reconstruction of missing transcript. During assembly of the record, the official court reporter submitted an affidavit to the court that she had misplaced her audiotapes for trial dates December 13 and 14, 2001. Pursuant to Mass.R.A.P. 8(c), as amended, 378 Mass. 932 (1979), the defendants submitted their proposed version of the missing testimony, but the trial judge rejected their submittal as distorted, argumentative, and self-serving. The trial judge reconstructed the missing testimony from his notes and, on July 20, 2006,

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[49] Because we conclude that the judge's subsidiary findings of fact do not support a conclusion that FCC's conduct constituted unfair trade practices, we need not (and do not) express any view on the judge's conclusion that an attorney may not assert a claim against a former client under G. L. c. 93A.

ordered that his reconstruction would serve as the approved settlement of the testimony on the affected days. See Mass.R.A.P. 8(c). The defendants contend on appeal that the judge's reconstruction is incomplete and inaccurate. However, "[w]hen a dispute respecting the record is submitted to the . . . court, its determination is conclusive, absent a showing that the court has intentionally falsified the record." Burda v. Spencer, 28 Mass. App. Ct. 685, 689, 554 N.E.2d 1227 (1990), quoting from Letch v. Daniels, 401 Mass. 65, 67-69, 514 N.E.2d 675 & n.3 (1987). [50]

b. Modification of the record. Following assembly of the record and entry of the appeal on the docket of this court, the defendants filed a motion in the Superior Court seeking "correction and/or modification of the record." Specifically, the defendants identified eight documents that they contended should be included in the record, and asserted that a box in the office of the clerk of the Superior Court contained additional documents. A judge other than the trial judge allowed the motion in part and denied it in part. [51]

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[50] To the extent that the judge's reconstruction of the expert's testimony differs from the expert's affidavit describing his proposed trial testimony, we note simply that it is not unusual for trial testimony to vary from what a witness or the parties may have anticipated; we do not view any such variance to stand as evidence that the testimony was reconstructed falsely.

[51] During the intervening period, the trial judge had been appointed to this court.

The motion judge allowed the motion insofar as it sought to add four of the eight documents specified by the defendants. We agree with the motion judge that the remaining four documents should not be included in the record. We also agree with the motion judge that a vague reference to a box of unspecified documents furnished no basis to conclude that the additional documents should be included in the record on appeal.[52]

The defendants further sought to "correct" the record, claiming that the official transcript contained various errors.[53] The judge properly denied the motion in its principal respects. [54] The purpose of an official transcript is to eliminate disputes between interested parties regarding the record of the proceedings. A party's self-serving and

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[52] The excluded documents consist of proposed amended complaints attached to motions to amend filed in the United States District Court for the District of Massachusetts while the case briefly was pending there. No action was ever taken on the motions to amend, either in the Federal District Court or following return of the case to the Superior Court.

[53] The defendants contended that the transcript omitted objections by Casher to (i) the decision to allow jurors to wear costumes on Halloween, (ii) the handing out of candy to jurors by the plaintiffs' counsel, and (iii) the circulation of a "cast list" for a movie version of the trial. They also asserted that a statement made by Gilleran concerning Salem Suede's bankruptcy fraud was missing from the transcript. Finally, they noted that the expedited version of the transcript of one day was more complete than the final version of the transcript for that day (the final version omitted an "off the record" conference that was recorded in the expedited version).

[54] The judge allowed the motion to substitute the more complete expedited version of the transcript, but otherwise denied it.

uncorroborated assertions of what transpired at trial cannot serve as grounds to contend that the official record of the proceedings, prepared by a neutral court official, was falsified.

c. Motion to strike. After the defendants filed their principal briefs and record appendix, the plaintiffs filed a motion with the single justice, seeking to strike various materials from the record appendix. The single justice denied the motion as to most of the materials, but allowed it as to some. We discern no error in the ruling of the single justice, with one exception. [55] On December 27, 2005, Melita filed a motion in the Superior Court, seeking to vacate the judgment under Mass. R. Civ. P. 60(b)(1), (4), and (6), 365 Mass. 828 (1974). Following denial of that motion, she filed a notice of appeal and the appeal was consolidated with the appeal from the judgment. The order of the single justice struck the motion (but not the accompanying memorandum in support of the motion). The motion is reinstated as part of the record. [56]

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[55] The materials struck included the proposed amended complaints described in the preceding section (the motions relating to which were never acted upon), a variety of newspaper articles published following conclusion of the trial, and several motions and affidavits filed after entry of the judgment and not before us in these appeals.

[56] For the first time in her reply brief, Melita argued that the motion to vacate was erroneously denied. We are not required to consider arguments made for the first time in a reply brief. See Truong v. Wong, 55 Mass. App. Ct. 868, 878, 775 N.E.2d 405 (2002). In any event, there was no error. The motion was untimely insofar as it sought relief under Mass.R.Civ.P. 60(b)(1)

12. May 1, 2007, order of the single justice (the companion case). Substantially all of the claims of error raised in the appeal from the order of the single justice of May 1, 2007, are duplicative of errors claimed in the main appeal, and accordingly have been addressed in the preceding discussions. Melita asserts an additional error in the refusal of the single justice to remand the case to the Superior Court, based on her contention that the judgment is not final because it failed to adjudicate the amount due to Casher. The contention fails, for the reason that the pleadings include no request for such an adjudication.

13. Disposition. In appeal no. 06-P-1419, the judgment is affirmed. The orders of the trial judge reconstructing the record and denying the defendant's motion to correct or modify the record are affirmed. The orders of the single justice dated December 17, 2007, are modified so as to reinstate the motion of Melita Picciotto pursuant to Mass.R.Civ.P. 60(b) as part of the record on appeal. In all other respects, those orders are affirmed.

In appeal no. 07-P-842, the order of the single justice dated May 1, 2007, is affirmed,

So ordered.

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and (4). Furthermore, Melita's argument demonstrates no legal error in the denial of the motion.

APPENDIX C – PETITION FOR REHEARING OF MELITA PICCIOTTO DATED DECEMBER 2, 2008

(all emphases were in the original document)

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December 2, 2008

Hon. Mark V. Green
Associate Justice
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108-1705

Re: Albert P. Zabin, et al v. Stefano Picciotto, et al – No. 06-P-1419

Dear Justice Green:

On behalf of defendant-appellant Melita Picciotto ("the Appellant") in the above-entitled action, the Appellant hereby petitions, pursuant to the provisions of Mass. R. App. P. 27, for rehearing of the Appellant's appeal that was decided by a decision ("the Decision") of the Appeals Court dated November 18, 2008. This petition is based upon the Court's misunderstanding of the underlying facts, which the Appellant respectfully submits have caused this Court to misapply the relevant law in reaching its decision. Furthermore, the Appellant hereby incorporates by reference the arguments

made by appellants Stefano Picciotto, Judith Picciotto. Athena Picciotto, and Foreign Car Center, Inc., however, she will not repeat them since it would be unnecessary.

1. The Trial Judge Met Ex parte With an Actual Party to the Litigation

On page 36 this Court erroneously found that:

> The defendants contend that the judge met, outside the court room, with a partner of one of the attorneys representing the plaintiffs.

However, on page 43 of the Appellant's brief, the question posed to this Court was as follows, with all emphases in the original:

> IV. WHETHER MELITA PICCIOTTO RECEIVED THE REQUISITE FAIR TRIAL BEFORE A FAIR TRIBUNAL WHERE THE TRIAL AND PRE TRIAL JUDGE MET EX PARTE WITH ONE OF THE ATTORNEY PARTIES TO THE LITIGATION DURING THE PENDENCY OF THE ACTION, DENIED THE FRIENDSHIP, AND WAS **UNTRUTHFUL**, CLAIMING THAT NO SUCH MEETING EVER TOOK PLACE. AFTER THE MEETING JUDGE SIKORA IMMEDIATELY TOOK DE FACTO ASSIGNMENT OF THE CASE.

The argument to this Court was as follows:

In a press interview explaining the reason why Massachusetts has a rotation system, the Chief Justice for the Administration of the Trial Court explained that he could imagine no fate worse than being "saddled with a Judge with whom you do not get along." The Appellant wholeheartedly agrees.

Judge Sikora took, *sua sponte*, *de facto* assignment of this case (A. 212-261), over the vehement objection of Melita Picciotto. The record is clear no special assignment was ever issued to Judge Sikora. Judge Sikora subjected her to this ***extremely hostile*** *de facto* assignment for years. Despite being moved, Judge Sikora refused to recuse and allow the litigants to access the circuit system that all other litigants in Massachusetts who object to being "saddled" with "special justices" enjoy the benefit of. (A. 1541-1562)

Judge Sikora's *de facto* assignment is particularly egregious in view of the fact that he took it after meeting *ex parte* with **one of the parties to the action** [emphases is added] Robert Costello. When presented with a motion to recuse Judge Sikora, simply **denied** having had any meeting *ex parte* with Robert Costello, contrary to Mr.

> Costello's testimony under oath. (A. 1541-1562) **It is against this backdrop, and the attendant behavior, that this case must be reviewed.** Judge Sikora's repeated and blatant disregard for the truth where it suits his interest is scandalous.
>
> In meeting *ex parte* **with a party to the action** [emphases is added], in being untruthful with the litigants about meeting with **a party to the action** [emphases is added], and in taking *de facto* assignment to create false records to deprive Melita Picciotto of her property, in both of her actions, the lower court blatantly violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as Part 1 Article XI and Part 1 of Article XXIX of the Declaration of Rights of the Massachusetts Constitution.

The plain language of the brief repeatedly stated that the judge met with **"a party to the action."** The plain language also reflects that the Appellant never represented, or complained to this Court that the meeting occurred with a partner of an attorney who was representing the plaintiffs.

In any case, a cursory look at the caption of the case proves that one of the plaintiffs is Schneider, Reilly, Zabin and Costello. Plaintiff Costello is a major stockholder and an officer in the

plaintiff's firm and had a great deal of money at stake in the underlying action and the other related actions. As a plaintiff to the action, his firm demanded 40% of the entire $9 million settlement. (A. 445) Plaintiff Costello was also a party in the separate action of Melita Picciotto et al v. Robert Costello, et al, in the related action which was dismissed April 5, 2002, by the very same trial judge that Plaintiff Costello had met with *ex parte*, i.e., Judge Sikora (A. 662-670).

A corporation is a creature of the law, a "separate and distinct legal entity [that] can only act through its agents." Grand Pacific Finance Corp v. Brauer & others, 57 Mass. App. Ct. 407; 783 N.E.2d 489 (2003), quoting Sunrise Properties, Inc. v. Bacon, Wilson, Rathner, Cohen, Salvage, Fialky & Fitzgerald, P.C., 425 Mass. 63, 66, 679 N.E.2d 540 (1997). As a major stockholder, officer, and treasurer of the firm, Plaintiff Costello was the mind and soul of the litigation against the Appellant. He, acting for his firm, even brought a G.L. c. 93A, § 11 claim against the Appellant and her 14-year-old sister. (A. 137-141; see also brief of Athena Picciotto at page 9) As described in the Motion to Recuse and the affidavits supporting said motion (which is referenced on pages 45 and 46 of the Appellant's brief), Plaintiff Costello approached the trial judge who was sitting on his case[1] and offered him a

---

[1] See A. 1541-1562, which includes the Motion to Recuse, the affidavits of bias and prejudice by the affiants, and the affidavit of good faith by the counsel representing the affiants, attesting that both the affiant and said counsel are acting in good faith.

career-advancing position. Said conduct by a party to litigation is improper and, in the Appellant's opinion, constitutes a form of a bribe. Parties to a litigation should not be subjected to it.

In addition, said behavior is proscribed by the Mass. R. Prof. C., more specifically, SJC Rule 3:07, § 3.5(a) and (b). Plaintiff Costello, happens to be an attorney, and thus, additionally subject to the Mass. R. Prof. C.[2]

The United States Supreme Court has recognized in a variety of contexts that the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law. See, e.g., Alden v. Maine, 527 U.S. 706, 752 (1999) ("A state court's legitimacy derives from fidelity to the law"); United States v. Mistretta, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non partisanship.") Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) ("public confidence [is] essential" to the judicial branch) (quoting United Sates v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring). That public confidence is being eroded by activities such as those at issue in this case and in other cases like it.

---

[2] SJC Rule 3:07, § 3.5 states, "A lawyer shall not: a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; b) communicate ex parte with such a person except permitted by law."

Melita Picciotto recognizes that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986). "[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Bracy v. Gramely, 520 U.S. 899, 904 (1997). Nonetheless, the Supreme Court has consistently required disqualification when judicial conduct has fallen below the constitutional floor.[3]

The Appellant respectfully submits that this case affords this Court an important opportunity to clarify whether this due process constitutional floor applies to cases involving *ex parte* social contacts between a sitting judge and a party to the litigation.

The foregoing is especially important in view of the finding of this Court on page 45 that audiotapes of the trial are mysteriously "missing" and that the trial judge, in spite of the "seriousness and gravity of the formal court proceedings" allowed

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[3] See Tumey v. Ohio, 273 U.S. 510 (1927) (judge's assessment of civil fines went into his pocket); In re Murchison, 349 U.S. 133 (1955) (judge who presided over a "one-man grand jury" also presided over contempt proceedings related thereto); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (judge reviled by defendant also presided over his contempt trial); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (mayor's adjudication of traffic fines contributed to city finances); Aetna, *supra* (judge voting for novel state cause of action against insurer had similar claim against an insurance company pending in a lower court).

the jurors to hear evidence while dressed in Halloween costumes.

This Court diminishes the importance of the trial judge allowing the opposition to interact with the with the jurors by passing out candies, joke memorabilia, and a cast list of who would play whom in the movie as "uncorroborated assertion of what transpired at trial." However, the so-called assertions were presented to this Court in the form of sworn deposition testimony of the court-appointed trial counsel, attesting to her objections to the inappropriate interactions between counsel and the jurors. (A. 944-94) Said testimony was taken under the pains and penalties of perjury, and the opposition has never provided a countervailing affidavit.

Furthermore, the Appellant filed a motion for an evidentiary hearing on this issue in the lower court (A.1754-1759). The motion was opposed by the parties who had engaged in the offensive conduct (Docket Entry No. 812). Another judge in the lower court (Fishman, J.) denied the motion for an evidentiary hearing, but found as follows:

> It is interesting to note that the attorney lienholders in their opposition to this motion do not dispute the claim that counsel passed out a cast list and joke bumper stickers to the jurors. (A. 1671)

The evidence is compelling that the missing tapes contained inflammatory behavior on the part of the plaintiffs, just as was reported in the press (A.

1138). Under such circumstances, there is motive for the tapes to be missing. The tapes are not missing by accident. This statement is not intended to impute the integrity of the court reporter, who, it should be noted, is also a court employee. The tapes at issue are stored at the Suffolk Superior Court and are accessible to numerous court employees, including the trial judge, himself.

Whether or not they were simply lost or actually stolen, the Appellant should not be forced to suffer the consequences when there is remedy through an evidentiary hearing in order to document what actually happened. That is a substantive due process right.

This is all the more important in view of the fact that neither the trial judge nor the plaintiffs would want this improper interaction between the jurors and the attorneys representing the plaintiffs to come to light. This issue was appealed and was properly preserved for appellate review. (A. 1783-1784; see also the Appellant's brief of November 6, 2007)

Finally, in footnote 53 of this Court's Decision, this Court states that the final version of the official trial transcript has merely "omitted" an off the record conference that was recorded in the expedited version. That is not accurate. The Appellant(s) did not simply complain that critical portions of the official record were missing, but explicitly pled that:

> Not only are many segments of trial testimony missing, but the trial

> transcript has been **deliberately altered and tampered** with.[4]

Through the Appellant's brief of November 6, 2007, and the other briefs before this Court, the Appellant(s) specifically informed this Court that "The revised official trial transcript also contains words that prove there was **a deliberate alteration** to the original record . . ." (emphases added). Not one of the judge's words match the revised version. Not one. This Court is once again requested to compare the expedited trial transcript which has the trial judge closing:

> THE COURT: All right, I'll see you on Wednesday at 9 O'clock
>
> (ADJOUNRNED AT 5:20 P.M. (A. 971-972)

to the **altered language** that appeared in the official trial transcript that the court reporter subsequently produced:

> THE COURT: Okay. We can go off the record, Paula
>
> (OFF THE RECORD AT 5:47 p.m. (A. 977)

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[4] See pages 2, 21, and 22 of the February 14, 2008, reply brief of the Appellant. All emphases is added

This Court minimized the deleted portion as an "off the record conference," when in fact, it contained a court ruling that substantially affected the property rights of the Appellant.

The Appellant would like to point out to this Court that in the very case that this Court relies on to deny the Appellant relief, the Massachusetts SJC ruled that, "Social contact between the judge and litigants in the course of trial is certainly disfavored and should not occur."; Demoulas v. Demoulas, 428 Mass. 543; 703 N.E.2d 1141 (1998 (All the worse, the Appellant argues, when an *ex parte* meeting with a party to the litigation is accompanied by an offer of a prestigious position.) (A. 1541-1562)

Canon 2 of the Code of Judicial conduct mandates:

> **A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities**
>
> A) A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> (B) A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to

> convey the impression that they are in a special position to influence him.

The Appellant submits that the facts of this case would require judicial disqualification. The trial judge's *ex parte* meeting with a party to the litigation during pendency of said party's case with the attendant offer of a prestigious position, combined with the trial judge's denial (when confronted) that the meeting had occurred, would leave the average person to conclude that there is, at the very least, the *appearance* of impropriety that could compromise the independence, integrity, and impartiality of the trial judge. This Court is not required to decide whether, in fact, the trial judge was actually influenced. The Supreme Court of the United States has ruled that, "The Due Process Clause `may sometimes bar trial by judges who have no actual bias.' . . . But to perform its high function in the best way, `justice must satisfy the appearance of justice.'" 475 U.S. at 824 (quoting *Murchison,* 349 U.S. at 136); see also Aetna Life Ins. Co. v. Lavoie, *supra.*

The Appellant requests that this Court correct its erroneous record, and expressly rule as to whether a party to a litigation may meet *ex parte* and make offers to the sitting judge.

2. The Lack of Decorum in the Courtroom

On page 37 of its Decision, this Court found that, "The introduction of Halloween costumes cannot but have detracted from the seriousness and gravity of formal court proceedings," but excuses the

behavior by finding, "However, as to the defendants' claim of a due process violation, the judge did not merely accommodate the jurors' request; he consulted with counsel for all parties before doing so, and all counsel agreed." The Appellant never agreed to such a circus (A. 1710-1711), and should not have been subjected to a court-imposed counsel that would agree to such misconduct. She deserved better. The Appellant respectfully suggests that she has not waived this issue, and asks that this court reconsider the ruling.

"It is of prime importance in disposition of matters before judge, not only that justice be done, but it appear to be done." In Re Troy, 364 Mass. 15, 306 N.E.2d 203 (1973). Certainly there cannot be the appearance of justice occurring in a courtroom that allows jurors to come to court dressed in Halloween costumes.

Furthermore, even though this Court will not take up the issue of the inappropriateness of the attorneys for the opposition passing candies, joke memorabilia, and cast list to the jurors for a movie version of the trial because the tapes of the official trial transcript have been "lost", this Court is being requested to review the ruling of the lower court Judge (Fishman, J.), who found as follows:

> It is interesting to note that the attorney lienholders in their opposition to this motion do not dispute the claim that counsel passed out a cast list and joke bumper stickers to the jurors. (A 1671)

The matter can simply be resolved by this Court through an evidentiary hearing, or it can be sent back to the lower court for an evidentiary hearing. However, when the two actions are viewed together, i.e., the jurors dressed in Halloween costumes and the inappropriate interaction of the plaintiff's attorneys with the jurors, there should be no question in this Court's mind that the conduct violated due process.

As the SJC ruled In the Matter of Angela, 445 Mass. 55, 833 N.E.2d 575 (2000):

> The specific dictates of due process generally require consideration of three distinct factors:
>
> > First, the private interest that will be affected by the official action;
> >
> > Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
> >
> > Finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Appellant's and co-appellants' private interests were affected by said action. There was no value in conducting a trial with jurors dressed in Halloween costumes, other than for the entertainment of the trial judge and the plaintiffs

(who were openly beside themselves with laughter and giddy with elation at the level of injustice that was being afforded the defendants by the court).

This Court has recognized that at least one of the appellants had claims for intentional infliction of emotional distress. Clearly the "festival" atmosphere interfered with the adjudication. There was no legitimate government interest to allow it to occur. The Appellant has already argued that clients should not be saddled with court-appointed counsel or officers of the court who would authorize such a bizarre "circus,"; however, the fundamental issue at bar is that the trial judge had a separate and *independent duty* to oversee the decorum of his courtroom.

This Court is requested to review the issue.

3. The Right of Self Representation

This Court, at page 34 of its Decision, states that it recognized that, "[a]s a general proposition, individuals may prosecute or defend their own action. G.L. c. 221, § 48." This Court has further stated that the trial judge did not abuse his discretion for two reasons: a) because the attorney that the trial judge saddled the Appellant with was familiar with the intricacies of the case; and b) because the Appellant had allegedly engaged in disruptive behavior during a number of pretrial proceedings. In short, this Court adopted the

position of the trial judge, that self-representation is not a matter of Constitutional right, but a discretionary statutory right subject to what the trial judge termed his "grace." Pursuant to ARTICLE XI of the Massachusetts constitution:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly and without delay; conformably to the laws

Pursuant to FIRST AMENDMENT of the Constitution of the United States of America:

> Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Thus, every subject of the United States and the Commonwealth of Massachusetts has a fundamental right to petition the third branch of government, *i.e.*, the courts of Massachusetts and the courts of the United States of America. Nowhere in the Constitution does it state that said right exists exclusively through proxy, *i.e.*, court-appointed

counsel. In fact, the right of an attorney to appear in a courtroom on behalf of a client is derivative from the authority that the client infers on him or her. "On due process grounds . . . parties have a constitutional right to retain counsel in a civil case." R.G. & another v. C. Hall & others, 37 Mass. App. Ct. 410, 640 N.E. 2d 492 (1994), citing Potashnick v. Port City Constr. Co. and others, 609 F. 2d 1101 91980), and *Gray v. New England Tel. Co.*, 792 F. 2d 251, 257 (1st Cir. 1986). ." See also the statutory right, conferred by G. L. c. 221, § 48, as noted in R.G. & another v. C. Hall & others, *supra*. Therefore, this Court has already ruled that the right of self-representation is both statuary and constitutional.

This Court, however, did not address the Constitution implications of denying a litigant the right of self-representation. Before a fundamental right can be taken away from a citizen of the United States, that deprivation must satisfy due process.

As the SJC ruled In the Matter of Angela, 445 Mass. 55, 833 N.E.2d 575 (2000):

> The specific dictates of due process generally require consideration of three distinct factors:
>
> > First, the private interest that will be affected by the official action;
> >
> > Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

> Finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

This Court has not considered that on October 13, 2000, approximately a year before trial, Superior Court Judge (Volterra, J.), granted Melita's motion to proceed *pro se* (A. 1623-1625). This Court has not addressed the egregious harm that the Appellant suffered, as the court-imposed counsel then billed the Appellant for approximately $3.5 million for defense of her property against the attorney liens. Yet, the same trial judge that appointed her to be counsel, ruled that the Appellant could not have her settlement funds because that very same counsel, after instructing her to deposit her settlement funds into the court, had never even made her a claimant to the fund. This Court has upheld that ruling.

Judge Sikora overturned the ruling of Judge Volterra, and entered findings about the courtroom behavior of the Appellant that were absolutely false. This issue was briefed in the Appellants brief dated February 14, 2008.[5] In fact, the Appellant made a diligent effort for this Court to reproduce the hearing transcripts of those alleged incidents. Furthermore, on pages 23-34 of said brief, the Appellant reproduced the May 18, 2001, hearing transcript in

---

[5] The Court ordered the Appellant to name said brief a reply brief, however, it was not a reply brief, but the initial brief in the related appeal; see Docket Entry No. 119 of January 18, 2008 (Gelinas, J.).

which the Appellant had a colloquy with the trial judge, and requested that the trial judge explain to her what she had done that "offends" him.

The trial judge responded:

> THE COURT: No. I'm not going to do that.

The trial judge was then asked by Attorney Casher:

> Ms. Casher: May I just have one word, Your Honor? So you would be referring to the language that's on the record on those events in which Melita has been removed from the courtroom?
>
> THE COURT: Yes, we can go back and cull out those transcripts and employ them as necessary. (A. 1148-1149)

The record of the three incidents at issue were reproduced by the Appellant at A. 1124-1127, 1153-1154, and 1159-1167. This Court was requested, through the Appellant's brief, to make a ruling based on the factual hard language of the record, itself, rather than the judge's findings. The trial judge was biased and he had an agenda in mind, specifically to protect the financial interest of his highly placed, personal friend, Plaintiff Costello. In order to protect herself from false findings, the Appellant took two additional steps: a) She requested an evidentiary hearing regarding her behavior, but the trial judge denied said evidentiary hearing (A. 1158); and b) the Appellant requested the protection of being able to have a camera in the

courtroom. The Appellant stated she wished to be protected from any unwarranted jail time or sanctions (A. 1151). The trial judge ruled "No cameras, no videotapes." (A. 1152, lines 15-16) The Appellant submits that the trial judge did not want to have his frightening, abusive, behavior documented, particularly in view of the price former Judge Lopez paid for behavior that paled in comparison to that of Judge Sikora. Indeed, members of the Governor's Council commented on Judge Sikora's untruthfulness, his "disrespectful" demeanor, and independently deemed it necessary to call in state troopers to protect the Appellant from his entourage (while he was still sitting on her case). (A. 978-981) Notably, the Council complimented the Appellant on her articulate presentation, as did this Court, (Justice Green).

For the Court to rule that the public has a right to videotape a courtroom proceeding, but a litigant does not, is fundamentally unfair. Especially, when, as in the instant case, the videotape was requested to prove that the judges' finding regarding the temperament and character of Appellant were false and designed with intent to deprive her of constitutional guarantees. Additionally the request was specifically made to document the aggressive, abusive, unethical behavior the Appellant was repeatedly subjected to in the courtroom. Citizens of Massachusetts deserve that minimum safeguard.

Conclusion

The Appellant petitions the Court, for the reasons set forth above, to rehear the issues presented by this appeal on the grounds that, upon review of the Decision issued by the Court, it would be proper and just to allow a rehearing so that a revised Decision could be issued.

Respectfully submitted,

Melita Picciotto

APPENDIX D – PETITION FOR REHEARING OF STEFANO AND JUDITH PICCIOTTO DATED DECEMBER 2, 2008
(all emphases were in the original document)

418 Lafayette Street
Salem, MA 01970-5347
FAX/PHONE: (978) 741-0218

December 2, 2008

Hon. Mark V. Green
Associate Justice
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108-1705

Re: Albert P. Zabin, et al v. Stefano Picciotto, et al – No. 06-P-1419

Dear Justice Green:

On behalf of defendants-appellants Stefano Picciotto and Judith Picciotto ("the Appellants") in the above-entitled action, we hereby petition, pursuant to the provisions of Mass. R. App. P. 27, for rehearing of the Appellants' appeal that was decided by a decision ("the Decision") of the Appeals Court dated November 18, 2008. This petition is based upon points of law and underlying facts that the Appellants respectfully submit the Court overlooked or misapprehended in the Decision. Furthermore, the

Appellant hereby incorporates by reference the arguments made by appellants Melita Picciotto, Athena Picciotto, and Foreign Car Center, Inc.

1. The Issue Of Postjudgment Interest

On page 20, footnote 26, this Court ruled:

> The defendants' separate contention that postjudgment interest should not have accrued, because no final judgment entered is disposed of by our conclusion, supra, that final judgment did enter.

On page 45 of Athena Picciotto's brief (whose Issues Presented for Review were adopted by reference by Foreign Car Center, Inc., Judith Picciotto Stefano Picciotto and Melita Picciotto), Athena Picciotto ("Athena") asked this Court to review the appropriateness of the postjudgment interest.

Her question was framed on page 45 as follows:

THE LOWER COURT ERRED WHEN IT IMPOSED A . . . POST JUDGMENT INTEREST AND COSTS

Athena argued as follows:

> In November of 2002, Athena Picciotto moved the lower court to pay Attorney Gilleran and all of the other attorney parties, so that no "punishment" interest would continue to accrue (A.

> 671-686). Attorney Gilleran and the other attorney parties still refused to accept the money, even after (in 2004) the lower court issued an order that it was going to distribute the judgments they had received a year earlier. The purpose of G.L. c. 231, §§ 6C and 6H is to compensate a damaged party for the loss of use and unlawful detention of money. Cahill v. TIG Premier Insurance Company, 47 F. Sup.2d 87D Mass. (1997). In the instant case, it was Athena Picciotto who has been subjected to the wrongful retention and loss of the use of her property, not Attorney Gilleran, and the other attorney parties who had entered into a "secret" agreement to assist him (A. 265-278). The trial court abused its discretion by "punishing" the wrong party.

Stefano and Judith Picciotto also clarified in their reply brief dated September 14, 2007, that each of the attorneys should not have been allowed postjudgment interest ". . . after the time that [they] could have collected the amount of [their] judgments[s] but declined to do so." Starting on page 17 of their reply brief, Stefano and Judith Picciotto stated the following:

> In November of 2002, Melita Picciotto and Athena Picciotto filed a motion seeking to have the judgments that had been obtained

by the Attorneys paid from the settlement funds that the trial court was holding. The matter went before the single justice (McHugh, J.) and the Attorneys opposed being paid. By such opposition, the Attorneys became the cause of their not being able to use the monies that they had been awarded, so they should not have received any interest from and after this point.

In February of 2004, the trial court issued an order stating that it was going to release to the Attorneys the amounts of their judgments, but, even then, the Attorneys refused to accept the money. See A. 1493-1498 and A. 101-112.

Despite the refusal of the Attorneys to obtain the amounts of their judgments when they had the opportunity to collect them, the trial court awarded each of them, who at a much later time elected to accept payment of his judgment interest at 12% that ran until the date of such acceptance. Attorney Albert Zabin has continued to decline to accept the amount of his judgment (*see* the Attorneys' Brief at 14), apparently quite satisfied in believing that such amount is earning a much better rate of return than he could expect to receive had he accepted the money and placed it into a commercial interest-bearing account.

The Court should order readjustment of the post-judgment interest that the Attorneys have received or that continues to accrue in order to assure

> that the Attorneys shall be compensated for loss of use of their money only for such periods as they could not have obtained access to such money.

However, this Court has not dealt with this important issue.

A cursory look at the underlying record, and more specifically A. 687-690, proves through a finding of the lower court, that in a letter dated December 22, 2003, Stefano Picciotto asked the lower court:

> I request that whether or not the attorney parties want to submit to a mediation that you do not oversee, you release all the money that you have impounded to the defendants and the plaintiffs as per the jury verdict and final judgment.

The memorandum and orders were dated February 20, 2004. (A. 687-690) Even then the attorney parties refused to accept the amounts of the final judgments. Nevertheless, the trial court rewarded them by giving them postjudgment interest.

The manner of the trial court's award of postjudgment interest has victimized the Picciottos and the other appellants because it represents an inversion of the purpose for which interest is awarded to a successful plaintiff. It has been well-established since the case of Perkins School for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 835 (1981) that G. L. c. 231, § 6C "is designed to

compensate a damaged party for the loss of use or unlawful detention of money." *See also* Sterilite Corp. v. Continential Casualty Co., 397 Mass. 837, 841 (1986). Moreover, as the court pointed out in said *Sterilite* case, the Legislature did not intend by enacting said statute to abandon the long-standing concern in common law that a liberal amount of interest awarded after judgments for plaintiffs could result in a windfall for plaintiffs amounting, in essence, to an award of punitive damages. *Id.* The opposite of such legislative intent occurred in this case; the trial court effectively awarded punitive damages against the Picciottos and the other appellants by distributing to the plaintiffs-appellees ("the Lawyers") from the settlement funds being held by the court, as postjudgment interest, large amounts of money for periods of time (years) well beyond the time (March 15, 2004) when the court allowed the Lawyers to obtain their judgment amounts from the court.[1] Therefore, the Lawyers were awarded such amounts even though, after March 15, 2004, they absolutely no longer were deprived of use of their money and such money was no longer being detained. At the urging of the Picciottos, the trial court issued an order on February 20, 2004 whereby it established a procedure for the Lawyers to obtain their judgment amounts as of March 15, 2004. (A. 687-690). In said order, the court stated the following:

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[1] The total of the judgments awarded to the Lawyers, without interest and costs, was $2,480,832. Interest at 12% accrues with respect to said amount at $297,699.84 per year!

> [T]hat distribution would bring important benefits to all parties. For the Picciotto parties and Juan Nunez, it would end the draining loss of pre- and post-judgment interest and would deliver to them a still substantial portion of the 1999 Travelers settlement sum. It would provide the attorney lienholders with collection of their judgments.

The Lawyers disobeyed said order, which instructed them in mandatory language, *i.e.*, "(a) each attorney lienholder *shall* file a statement of his or its entitlement . . . ." (emphasis added). (A. 639). The Lawyers refused to accept their respective judgment amounts for long periods of time after March 15, 2004, but when they finally agreed to accept such judgment amounts, the trial court awarded them interest at 12% right up until the time that they accepted such amounts. Albert Zabin, the last of the Lawyers to accept distribution of his judgment amount waited more than six years until after the jury verdict (until April of 2008) to accept such amount, which was $1,057,057.59. That *failure to accept* his judgment earned him ***more than a million dollars*** from the injured clients. It was contrary to the purpose of G. L. c. 231, § 6C for the trial court to award interest for such periods of time as the Lawyers were not subject to a loss of use or a detention of their money. Such loss of use of their money as the Lawyers were subjected to after the clients asked them to take their judgments was

entirely self-inflicted.[2] The trial court's actions inflicted punishment upon the Picciottos and the other appellants by awarding such inappropriate and unlawful amounts of interest. This Court should act to undo the injustice that was done to the Appellants with respect to this matter.

2. The Picciottos' Pleadings

The Court stated in the Decision that the Picciottos and the other appellants (hereinafter referred to jointly as "the Settling Parties") may not contend that their claims to their respective shares of the proceeds of their settlement with Travelers should have been determined in the interpleader action because: (a) their joint answer to Travelers' interpleader complaint made no request for a determination of the separate portions due to each of them; and (b) their answers and counterclaims filed in response to the complaints of the Lawyers requested no such determination. Decision at 3-4. However, Travelers' complaint stated that the purpose of the filing thereof was to allow the named defendants "to litigate, among themselves, without Travelers involvement, their respective entitlement to the Remaining Settlement Proceeds" (A. 321), and the Picciottos and the other appellants agreed in their joint answer that such should be done. (A. 326-332). Thereafter, the Settling Parties strictly complied with the trial court's detailed instructions

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[2] The Picciottos submit that the Lawyers were allowing their judgment amounts to accrue at interest at 12% and thereby earn a better rate of return than they could have expected to obtain by investing such amounts themselves.

as to how they should file new pleadings. The court ordered the Lawyers, as plaintiffs, to file complaints against the Settling Parties making claims for payment of fees owed to them; and it ordered the Settling Parties, as defendants, to answer the Lawyers' allegations and to assert all affirmative defenses and counterclaims that they had against the Lawyers. (A. 376-377).[3] Under such directions, the Settling Parties could not make a claim to the settlement proceeds in their pleadings because (a) there would be no opportunity to do so in their answers, which responded solely to claims that they owed the Lawyers fees; and (b) they had no counterclaim to make against the Lawyers whereby they would be making a claim to their respective portions of the settlement proceeds. A counterclaim represents a "claim for relief the court has power to give which at the time of serving the pleading the pleader has against any opposing party . . . ." Mass. R. Civ. P. 13. The Settling Parties could not claim in their counterclaims that the Lawyers owed them portions of the settlement proceeds. The Settling Parties were bound to follow the trial court's orders,

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[3] The Court ordered the Settling Parties to plead as follows:

> The Judgment Creditors shall become the defendants. They shall answer the allegations of the Lienholders and shall assert all affirmative defenses and counterclaims with their answers. They too shall plead with heightened particularity. As to claims of breach of contract, malpractice, and abandonment, they shall specify the time, circumstances, and details of such actionable conduct. . . . .

and they should not have been deprived of their right to have their respective shares of the settlement proceeds determined in the interpleader action by having followed the court's instructions.

What was most unjust as to how the trial court dealt with this matter subsequent to the parties' filing of new pleadings pursuant to the court's order is that the court allowed all of the parties to believe that the trial would proceed with the Settling Parties presenting evidence in support of their respective claims and the Lawyers then presenting evidence in support of their fee claims,[4] and then within the trial the court declared without prior warning that the Settling Parties could not

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[4] At a pretrial hearing, an attorney for the Lawyers described the procedure that all parties assumed would be followed in the following manner:

> My understanding of the law here and what will happen in this case is that the jury will decide how much the attorneys get, how much Melita gets, how much Athena gets, how much the Picciottos get, Mr. Nunez and Foreign Car Center. You know, when they decided to put their nine million dollars before the jury, I believe the allocation is not strictly limited to the attorneys, but to them as well. Now what they may decide privately is their prerogative, but it's an important issue. Your Honor, because ultimately for the jury to conclude how much money each of the lien holders is entitled to, the jury has to make a determination in the first instance the recovery that each of the Picciottos and Mr. Nunez obtain. . . . (A. 522-523).

present evidence as to their shares to the settlement proceeds because their complaints did not make any claims to such shares. (Page 11 of the Decision) The Settling Parties' complaints, filed in compliance with the trial court's order, did not cause the parties to the action to believe that the trial would not include evidence as to what each of the Settling Parties claimed is his share of the settlement proceeds.

All parties, with the apparent acquiescence of the trial judge, who did not disagree with the characterization as to how the trial would proceed as set forth in footnote 3, understood that the Settling Parties would be trying to establish the amounts of their respective shares.

Therefore, even if somehow the presentation of such evidence required the Settling Parties' complaints to include claims against the settlement proceeds, the complaints could have been amended to conform to the evidence (under Mass. R. Civ. P. 15(b)) without this representing a surprise to the Lawyers or imposing any unfairness upon them. (See A. 522-523) Said rule calls for the amendment of pleadings to conform to the evidence "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties . . . ." The request by the Settling Parties to be allowed to amend their pleadings under said rule was not, in light of the circumstances, tardy as stated in the Decision at 4. It was grossly unjust for the trial court to have penalized the Settling Parties for having obeyed his order as to how they should plead, and the Court should have provided a remedy for such unjustness in the Decision. It was an abuse of

discretion for the trial judge to have instructed the Settling Parties as to what should be contained in their complaints (after the suit had been filed for a purpose understood by everyone, *i.e.*, to litigate the parties' respective entitlements to the settlement proceeds), and then to refuse to allow the Settling Parties to litigate their claims because they had been so obedient as to follow his instructions.

3. The Taking of Attorney Casher's Deposition and The Introduction Into Evidence Of Portions of Her Deposition Testimony That Had Not Been Subjected to Cross-Examination.

The Picciottos as to this issue wish to point out a matter that was not covered in the petition for rehearing filed on behalf of Foreign Car Center, Inc. (while adopting the argument made as to this subject therein). The Court stated in the Decision that it was not an abuse of discretion for the trial judge to allow in evidence portions of the transcript of Attorney Casher's deposition testimony because, "if for no other reason than that (as observed by the trial judge) use of the deposition avoided the undesirable result of requiring Casher to testify at a jury trial in which she also appeared as an advocate." Decision at 8.[5] However, the trial judge required

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[5] The Court, in footnote 31, stated the following about how it was necessary to avoid such undesirable result:

> The solution of the defendants proposed during trial (to have Melita conduct a pro se cross-examination of Casher through live testimony at trial) would, among

Attorney Casher to take the stand and to read the portions of the transcript of her deposition testimony that the Lawyers wanted to introduce (over the objections of the Settling Parties). Therefore, Attorney Casher and her clients were subjected to what the Court itself has declared as being an undesirable result, "among other infirmities," the very purpose for which the Lawyers, the trial court and the Court asserted was justification for allowing such deposition and the introduction of such testimony was undermined by the way that the trial court required it to be used.

The Court should hold, based upon its own declared standard of undesirability of the conduct of a trial judge and the prejudice that would have been created in Ms. Casher had given live testimony at the trial, hold that the trial judge abused his discretion in requiring Attorney Casher to testify live, in person from the witness stand before the jury, and then, in further abuse of discretion, not allowing her to be cross-examined in violation of the Settling Parties' right to have all witnesses against them subjected to cross-examination.

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other infirmities, have created the very situation (trial counsel acting as both advocate and witness before the jury) that the use of the transcript was designed to avoid. The judge committed no abuse of discretion in denying that tactic.

4. Claims of Melita and Athena

October 20, 1999 (A. 368-374, at A. 370, lines 4, 5 and 6), the lower court ruled:

> Those settlement proceeds of approximately $7.5 million shall continue as the subject of the competing claims of the judgment creditors and the lienholders.

The lower court, at A. 369, defined the judgment creditor parties as, "Stefano Picciotto, Judith Picciotto, Melita Picciotto, Athena Picciotto Juan Nunez and Foreign car Center, Inc." Thus, the lower court specifically ruled that the claims of Melita and Athena Picciotto, as well as the other settlors were supposed to be determined at trial. Thus, the lower court violated due process by not allowing the adjudication to occur.

At trial there was evidence that the children's claims had a value of $3 million dollars. More specifically, there was colloquy between the trial judge and Attorney Greer with the jury present on the second day of trial (pages 155-156), as follows:

> THE COURT: Before we move on. Attorney Greer, as I understood your testimony, you related that your proposal of 3 million dollars in settlement related to the so-called third litigation; is that correct?
>
> THE WITNESS: That is correct, your Honor.

> THE COURT: To that litigation separately from the original 1983 suit?
>
> THE WITNESS: That is correct; but what the settlement agreement provided was that essentially all the monies of the judgment in the Essex action but not post-judgment interest, be paid. Essentially a hundred percent of the judgment as of the date of the judgment but not whatever interest we might have gotten in the supervening period, plus a 3 million dollar assented to judgment as to the lawsuit which was primarily for the daughters lead and other injuries.

The Court has acknowledged, without appearing to recognize the significance thereof, that Melita and Athena Picciotto, by virtue of the physical injuries that had been caused to their father, Stefano Picciotto and their mother, Judith Picciotto, for a long time have had claims for loss of parental consortium.[6] The failure of plaintiffs-appellants Albert Zabin and Michael Gilleran to pursue those

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[6] A dependent child may recover for loss of consortium as a result of injuries caused to his or her parent. *See* Charron v. Amaral, 451 Mass. 451, 769 (2008), citing Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 516 (1980). "[C]hildren have a viable claim for loss of parental society if they can show that they are minors dependent on the parent . . . . This dependence must be rooted not only in economic requirements, but also in filial needs for closeness, guidance, and nurture." *Id.*

claims on behalf of Melita and Athena represented malpractice by them. In addition to Melita and Athena, the other members of the Picciotto family should have been allowed to introduce evidence as to such claims both as part of their respective counterclaims against said attorneys for breach of contract and/or malpractice (negligence) and as part of their defenses to the amounts of fees to which said attorneys were claiming they were entitled obtain via *quantum meruit*. It was reversible error for the trial court not to have allowed the introduction of such evidence.

The Court commented on the lack of prosecution of said claims as follows:

1. It stated that, in 1994, Zabin filed a complaint on behalf of Melita and Athena, but he withdrew his appearance after her father had failed to provide him with medical records that would substantiate their claimed injuries. Decision at 2.[7] The Court further stated that Zabin withdrew his representation of Melita and Athena "upon his inability to satisfy himself that they had any grounds for a claim." Decision at 6.

2. It stated that Gilleran would not pursue the proof of claim that he had filed on behalf of Melita and Athena because a personal injury

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[7] In the Motion of Stefano Picciotto to Strike the Joint Briefs of the Appellees, which was filed with this Court on March 11, 2008, at page 12, Stefano Picciotto addressed this issue. Attorney Zabin was given those records. *See* Trial Day December 28, 2001 (A. 1288).

attorney whom he had engaged, after viewing available records, advised him that he could find no evidence that Melita or Athena had been injured by emissions from Salem Suede. Decision at 2.

3. It stated that, "Viewed together with evidence that the attorneys who had been engaged to file claims on Melita's and Athena's behalf had been unable to substantiate their injuries, we consider the judge to have acted within his discretion in concluding that the allocation agreement could have tended to mislead rather than illuminate the jury as to the value of Melita's and Athena's claims and their respective shares of the settlement proceeds." Decision at 4.

4. It stated that: "[I]t worked no prejudice for the reasons described in our discussion of the allocation agreement above. In any event, as we have observed (see note 21, supra), neither daughter ever asserted any claim for loss of consortium in any pleading in any proceeding (including the present action)." Decision at 9.

5. It stated that "We note as well that in arguing for the admission of the evidence, Casher described Melita's and Athena's claims for loss of consortium. However, no such claim had been asserted in any pleading they previously had filed, including the complaint that Zabin filed in their behalf in 1994 and the proofs of claim that Gilleran filed in their behalf in 1997. Nor did their answers or counterclaims in the present action

(which the judge's procedural order directed be pleaded 'with heightened particularity') assert any such claim. In excluding the evidence, the trial judge commented that its admission at that late stage of the trial would work an unfair surprise on the plaintiffs." Footnote 21 of the Decision.

However, of course, Zabin did not need any medical records of Melita and Athena in order to present a case on their behalf for loss of parental consortium; and he had no basis for contending that he could not satisfy himself that they had any grounds for a claim. His own expert witness, Camille F. Sarouff, Esq., testified at the trial that Melita and Athena had claims for loss of consortium (*see* A. 1172-1177), which Zabin has no excuse for not having recognized when he filed the 1994 action on their behalf. Furthermore, the personal injury attorney that Gilleran retained (or any competent Massachusetts trial practitioner) would not have advised Gilleran that Melita and Athena had no claim for loss of consortium. Indeed, Gilleran should have known that they had such a claim without seeking advice from another attorney. Gilleran was guilty of malpractice by not pursuing such claims.

The evidence to which the Court referred on page 4 of the Decision (*see* numbered paragraph 3 above) did not justify the conclusion that the Court reached, since such evidence tended to prove nothing more than that Zabin and Gilleran had performed incompetently on behalf of Melita and Athena. As a consequence, no conclusion can reasonably be reached other than that the trial judge abused his discretion in barring evidence as to the value of

Melita's and Athena's claims for loss of parental consortium.

Even if the trial judge could appropriately have ruled (which Melita and Athena deny) that admission of testimony concerning the value of their claims for loss of parental consortium would have worked an unfair surprise on the Lawyers if such testimony had been presented to ask the jury to determine such value, and, therefore, their entitlement to settlement funds, he could not appropriately rule that such evidence could not be introduced in support of their tort and contract counterclaims against the Lawyers and as part of their affirmative defenses to the Lawyers' claims against them.

The Court should reverse the judgment because the erroneous exclusion of admissible evidence is reversible error unless, on the record, the appellate court can say with substantial confidence that the error would not have made a material difference. *See Foreign Car Center, Inc. v. Salem Suede, Inc.*, 40 Mass. App. Ct. 15, 17 (1996), citing *DeJesus v. Yogel*, 404 Mass. 44, 48-49 (1989). The Court cannot in fairness say that the admission of the subject excluded evidence would not have made a material difference.

5. The *Quantum Meruit* Adjudication

The plaintiffs received individual awards of *quantum meruit* against specific individuals. By way of example only, the jury found that Attorney Zabin and Schneider, Reilly, Zabin & Costello were owed

the following **distinct and discrete** amounts by the following defendants (see A. 590-633):

Stefano Picciotto:	$ 35,233.35
Judith Picciotto:	$ 22,020.83
FCC:	$ 271,540.92
Juan Nunez:	$ 681,204.09
Melita Picciotto:	$ 0
Athena Picciotto	$ 0

In the case of McCabe, this Court found on page 17 that Stefano, Judith, Melita, Athena and FCC owed McCabe $68,507, on the principle of *quantum meruit* (as per A. 631 632) and that McCabe was owed by another one of the defendants (Mr. Nunez) the sum of $44, 630.

What this Court did not address is that one of the issues that has to be determined by the lower court in a *quantum meruit* action is the profit that the individual defendant received that is attributable to the underlying wrong; i.e., the unjust enrichment. Pursuant to the case law that this Court is relying on to determine the *quantum meruit* adjudication "the underlying basis for awarding *quantum meruit* damages . . . is unjust enrichment of one party and unjust detriment to the other party." Liss v. Studeny, *supra*, quoting Salamon v. Terra, 394 Mass. 857, 859, 477 N.E.2d 1029 (1985).

In the case at bar the unjust enrichment of any one of the parties has never been established, so the *quantum meruit* adjudication is fundamentally flawed. From the above judgments it is clear that money that belongs to one party is being used to pay

the debts of another party. That constitutes deprivation of property without due process of law, within the meaning of the Fuentes case (*see* Fuentes v. Shevin, 92 S. Ct. 1963(1972)).

Conclusion

The Appellants petition the Court, for the reasons set forth above, to rehear the issues presented by this appeal on the grounds that, upon review of the Decision issued by the Court, it would be proper and just to allow a rehearing so that a revised and more just and equitable Decision could be issued.

Respectfully submitted,

Judith Picciotto

Stefano Picciotto

APPENDIX E – MOTION OF MELITA PICCIOTTO TO CORRECT THE RECORD DATED DECEMBER 15, 2008

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. APPEALS COURT
NO. 06-P-1419

The travelers indemnity co.
Interpleader Plaintiff
v.
Stefano Picciotto, et al
Interpleader Defendants

MOTION OF MELITA PICCIOTTO TO CORRECT THE RECORD

The appellant Melita Picciotto (hereafter "the Appellant") hereby moves this Court to correct the factual record reported in its decision and order of November 18, 2008 (hereafter "the Decision"), in the above-captioned case. As grounds thereof the Appellant states that the Decision is based upon

this Court's misunderstanding of the underlying facts. The facts relied on by this Court are not consistent with, nor are they supported by, the underlying record. The Appellant respectfully submits that as a result of this Court's misunderstanding of the underlying facts, it has also misapplied the relevant law in reaching its Decision. The above notwithstanding, the record as stated by this Court is false and needs to be corrected.

In support of this motion, the Appellant hereby submits a memorandum outlining the erroneous findings of this Court. Said memorandum is incorporated herein by reference in its entirety as though set forth and pled herein in full. The Appellant further incorporates by reference the Affidavit of Stefano Picciotto in Support of the Motion of Stefano Picciotto to Strike the Joint Brief of the Attorneys-appellees, which was filed with this Court on March 11, 2008, as though set forth in full.

WHEREFORE, for the above reasons, the Appellant respectfully requests this honorable court to correct the record.
Respectfully submitted,

Melita Picciotto, Pro Se
418 Lafayette Street
Salem, MA 01970-5347
(978) 741-0218

DATED: December 15, 2008

Appendix F – Appeals Court Ruling Of January 22, 2009, That No Appeal Lies From The Panel's Revision Of The Uncontested Factual Record That Was Before Them

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
Boston, Massachusetts 02108-1705
(617) 725-8106

January 22, 2009

Melita Picciotto
418 Lafayette Street
Salem, MA 01970-5347

RE: No. 2006-P-1419
Lower Ct. No.: SUCV1999-015494

TRAVELERS INDEMNITY COMPANY & others
vs.
STEFANO PICCIOTTO & others

NOTICE OF DOCKET ENTRY

Please take note that, with respect to the Notice of appeal to the Supreme Court of paper #147, filed by Melita Picciotto. (Paper #154), on January 22, 2009, the following order was entered on the docket of the above-referenced case:

RE#154 No action necessary as no appeal lies from this action of the panel (Green, Graham & Grainger, JJ.). Notice

Very truly yours,

The Clerk's Office

January 22, 2009

APPENDIX G – SEPTEMBER 10, 2009 RULING OF THE MASSACHUSETTS SJC SINGLE JUSTICE DENYING CERTIORARI

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. SJ-2009-0131
SJ-2009-0132
SJ-2009-0135

STEFANO PICCIOTTO, *ET AL.*
vs.
THE HON. MARK V. GREEN, *ET AL.*

September 10, 2009

MEMORANDUM AND JUDGMENT

The plaintiffs have moved for summary judgment with respect to their claims in an action for relief in the nature of certiorari that the Appeals Court misstated certain facts in its opinion in *Zabin v. Picciotto*, 73 Mass. App. Ct. 141 92008), and that the Appeals Court misapplied the law in that case. The motion for summary judgment must be denied because the plaintiffs are not entitled to relief in the nature of certiorari where the errors they allege were reviewable in the normal appellate process, *i.e.*, by petition for rehearing filed with the appeals court or

by an application for further appellate review filed with the supreme Judicial Court, or by an application for further appellate review filed with the Supreme Judicial Court. See G.L. c. 249, § 4, Picciotto v. Chief Justice of the Superior Court, 446 Mass. 1015 (2006). Even if the Supreme Judicial Court denied further appellate review, which it did, see 453 Mass. 1103, 1105 (2009), reviewability is a determinative factor with respect to certiorari. Certiorari is a path to limited review where no other path for review exists. If another path exists, certiorari will never lie. "[C]ertiorari does not provide an additional or alternative avenue of appellate review." *Picciotto v. Superior Court Dept. of the Trial Court,* 437 Mass. 1019, 1020 (2002). See Mozek v. Revere, 443 Mass. 1020 (2005).

The defendants ask that the complaint for certiorari be dismissed. Because the plaintiffs had an appellate remedy available, namely, an application for further appellate review (as well as a petition for rehearing in the Appeals Court), certiorari is foreclosed.

The plaintiffs' motion for summary judgment is hereby DENIED, and the complaint is hereby dismissed.

By the court,

_____

Francis X. Spina
Associate Justice
Supreme Judicial Court

Entered September 10, 2009

APPENDIX H – UNITED STATES CONSTITUTION AMENDMENT I

AMENDMENT [I]

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for redress of grievances.

APPENDIX I – UNITED STATES CONSTITUTION AMENDMENT V

AMENDMENT [V]

Deprivation of property without due process of law

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation

APPENDIX J – EXCESSIVE FINE CLAUSE OF THE UNITED STATES CONSTITUTION AMENDMENT VIII

AMENDMENT [VIII]

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX K - UNITED STATES CONSTITUTION AMENDMENT XIV

AMENDMENT [XIV]

Property rights and equal protection of the laws not to be abridged by the States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State where in they reside. No State shall make or enforce any law, which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.